

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

957
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18,405 FILED MAY 6 1964

Nathan J. Paulson
CLERK

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant,

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees.*

Appeal from an Order of the United States District Court
for the District of Columbia

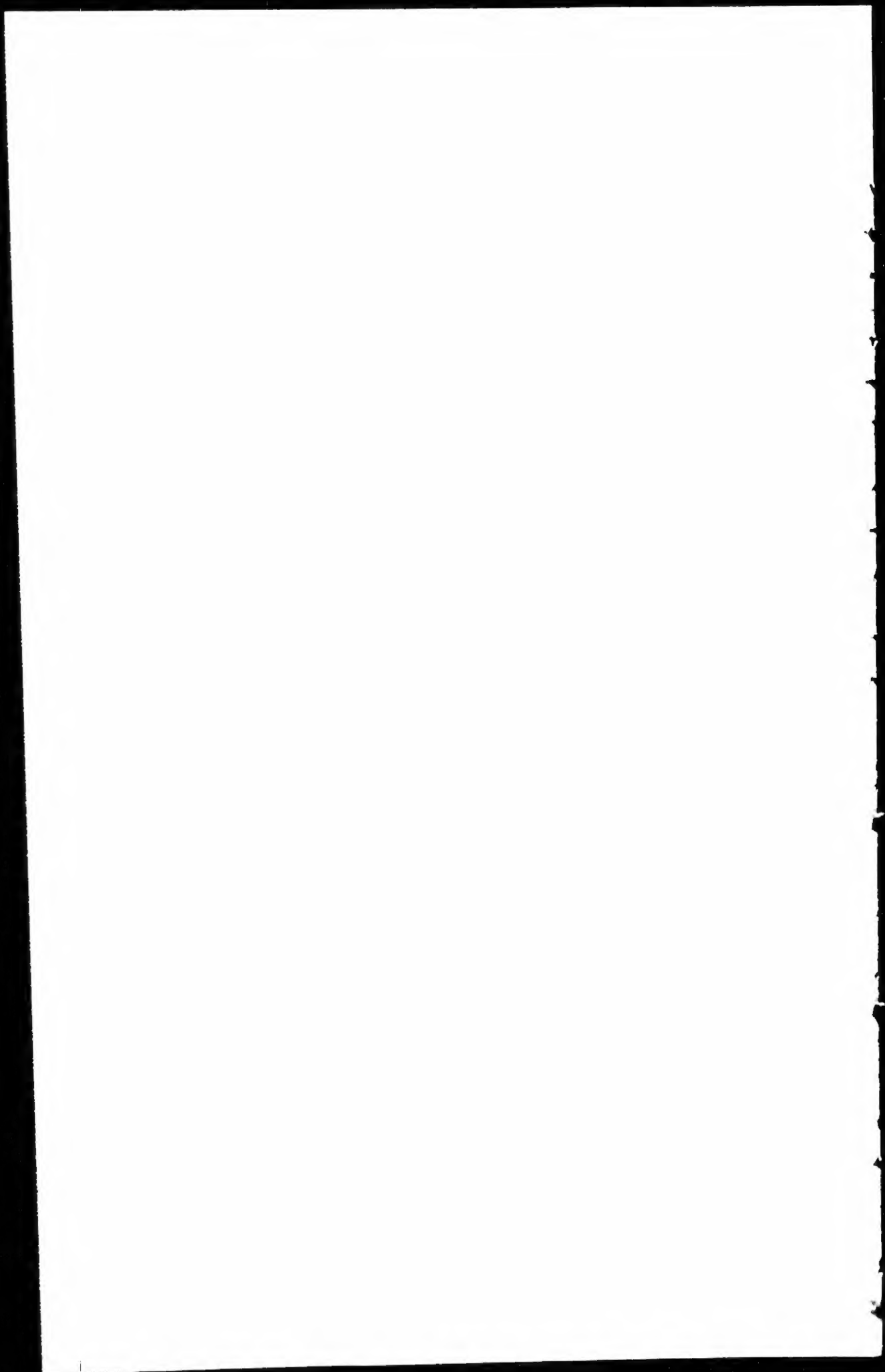
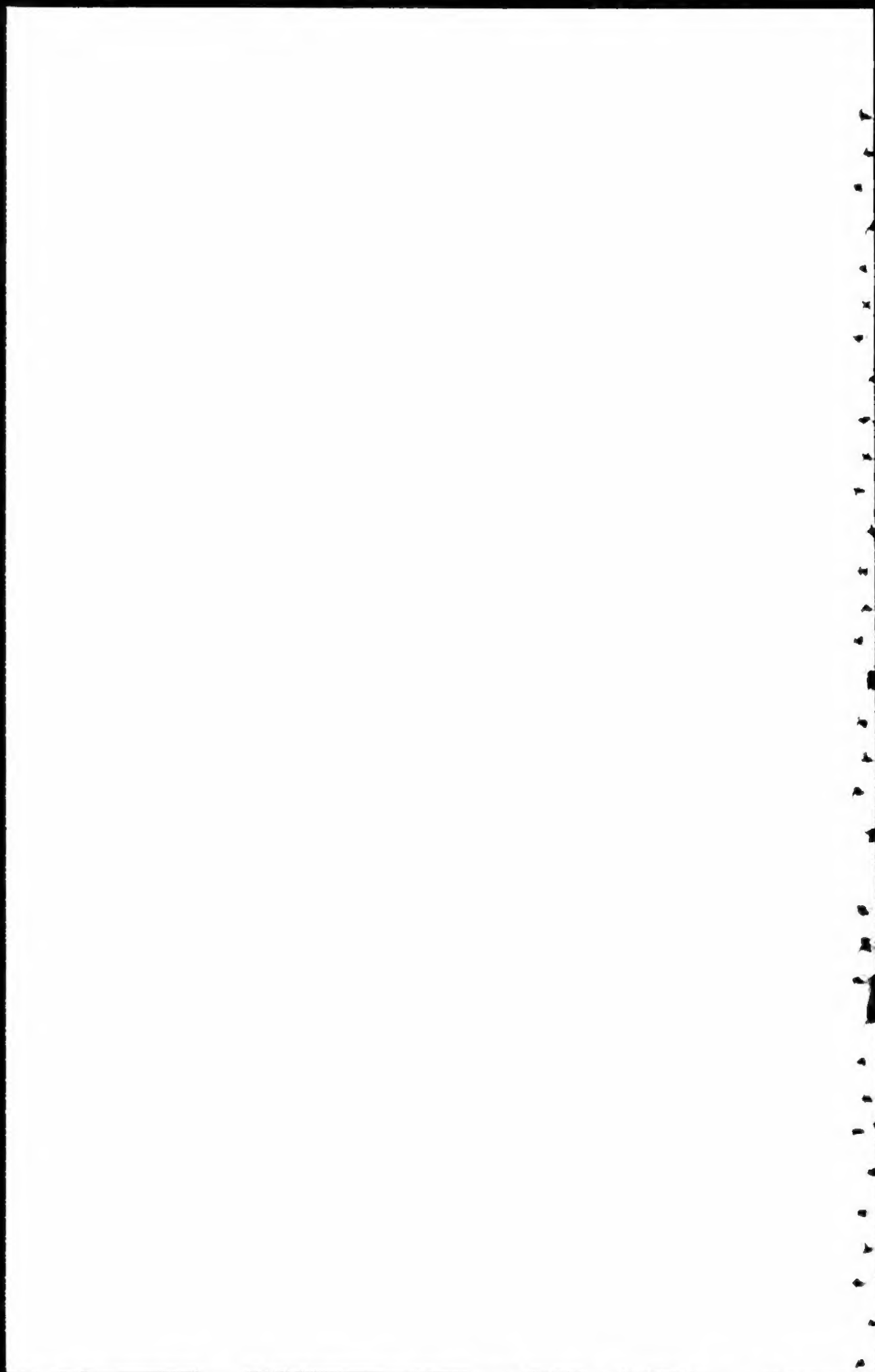


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JOINT APPENDIX—VOL. II

Relevant Docket Entries

1963

- August 12—Motion by plaintiff for issuance of order to show cause and for judgment of contempt; affidavit; P&A; c/s 8-12-63. M. . 8-12-63. Filed
- August 22—Answer of defendants to motion for issuance of order to show cause and for contempt; affidavit; c/m 8-22-63 Filed
- September 12—Stipulation of parties; exhs. A-H Filed
- September 13—Motion of plaintiff for issuance of order to show cause and for judgment of contempt, argued and taken under advisement. (Briefs to be filed before 9-30-63) (Rep: Dorothy F. Sweet) Walsh, J.
- November 6—Memorandum and order denying plaintiff's motion for issuance of an order to show cause and for judgment of contempt. (N) Walsh, J.
- November 15—Motion of plaintiff for reconsideration of order denying plaintiff's motion for judgment of contempt; P & A; c/m 11-14-63; M.C. 11-15-63 Filed
- December 2—Points and Authorities of defendants in opposition to motion for reconsideration of order denying plaintiffs motion for contempt; c/m 11-29-63 Filed
- December 4—Order denying plaintiff's motion for reconsideration. (N) Walsh, J.
- December 27—Notice of appeal by plaintiff; copies mailed to Thomas A. Flannery & Burton A. Zorn; Deposit by Kramer, \$5.00 Filed

Motion for Issuance of Order to Show Cause and for
Judgment of Contempt

Comes now the plaintiff, by its attorneys, and moves the Court:

- (a) That the defendants be punished for civil contempt for violating the order of this Court entered in this action on May 29, 1963;

(b) That the defendants be adjudged guilty of criminal contempt for their willful contemptuous acts in violation of said order, and punished accordingly;

(c) That the defendants be ordered to cease, and purge themselves of, contempt and be punished for each day contempt of said order continues;

(d) That the defendants be ordered to pay to the plaintiff the expenses and costs, including attorneys' fees, of bringing this contempt proceeding;

(e) That the defendants be ordered to show cause, at a time and date to be fixed by the Court, why they should not be held in contempt of Court and ordered as moved above; and

(f) That the plaintiff be granted such other and further relief as the Court may deem appropriate.

As grounds for this motion, the movant shows that the defendants are willfully in contempt of this Court's order of May 29, 1963, as fully appears from the affidavit of Ralph L. McCollum, attached hereto and hereby made a part hereof.

Respectfully submitted,

MILTON KRAMER

SCHOENE AND KRAMER
1625 K Street, N. W.
Washington 6, D. C.

HAROLD C. HEISS
RUSSELL B. DAY

HEISS, DAY AND BENNETT
Keith Building
Cleveland 15, Ohio

August 12, 1963

Affidavit

Ralph L. McCollum, being duly sworn, deposes and says:

He resides in Tuscumbia, Alabama, and his office is located in the First National Bank Building, Tuscumbia, Alabama.

On May 29, 1963, this Court entered an order in this action requiring the defendant railroads to operate their locomotives in accordance with the manner in which they operated locomotives prior to July, 1959, and ordering the defendants to maintain the status quo with respect to the operation of such locomotives, including the employment of firemen thereon, by following the same procedures and maintaining the same working conditions as they employed and maintained in the period 1950 to 1959. The order further provided that the defendants should have thirty days from the date thereof within which to recall furloughed firemen or helpers or hire new firemen or helpers to operate their lines in accordance with the Diesel Agreement as it was done prior to July, 1959.

At the time the Court entered such order, and for some years prior thereto, the affiant was the plaintiff's General Chairman on the defendant railroads, and he continued to hold such office until July 31, 1963, at which time he became a vice-president of the plaintiff. At all times prior to the issuance of the Court's order above described and since then, affiant, acting as General Chairman, has kept himself informed and observed the manner in which the defendants operated their locomotives and employed firemen thereon.

Prior to July, 1959, the defendants operated a locomotive without employing a fireman or helper on only very rare occasions. Such occasions would occur perhaps two or three times in a year, when at the last moment the assigned fireman could not work, a replacement could not be obtained in a reasonable time, and it was urgent that the train leave not too long after schedule. On those

rare occasions an official or an employee from some other craft would be assigned to take the place of the fireman.

After the expiration of thirty days following this Court's order of May 29, 1963, the defendants operated numerous locomotives without a fireman (helper) taken from the seniority ranks of the firemen's craft being employed on said locomotives. Among such occasions were the following:

Asheville Division

June 29—Waynesville Turn.	1:30 AM
June 29—Train No. 54 Asheville to Spencer	2:00 AM
June 29—Hendersonville—Hayne local	12:00 AM
June 29—Asheville—Spartanburg Turn.	5:00 AM

Washington Division

June 29—Orange Switcher

Charlotte Division South

June 29—Train No. 155 Greenville to Atlanta	9:00 AM
June 29—Train No. 153 Greenville to Atlanta	9:10 PM
June 29—Gainesville switcher	4:00 AM - 12:00 AM
June 29—Chamblee switcher	6:00 AM - 2:00 PM
June 29—Chamblee switcher	2:15 PM - 10:15 PM
June 30—Chamblee switcher	9:00 AM - 5:00 PM
June 30—Chamblee switcher	5:00 PM - 1:00 AM
June 30—Chamblee switcher	10:30 PM - 6:30 AM
July 1—Chamblee switcher	9:00 AM - 5:00 PM
July 1—Chamblee switcher	5:00 AM - 1:00 PM
July 1—Chamblee switcher	1:00 PM - 2:50 PM
July 3—Train 72-71 Inman to Gainesville and return	4:00 AM

Richmond Division

June 29—Train No. 56
Danville to Richmond

Knoxville Division

June 29—Morristown switcher	8:00 AM - 4:00 PM
July 1—Morristown switcher	8:00 AM - 4:00 PM
July 2—Bull's Gap—Asheville	1:00 PM - 9:00 PM
June 29—July 2—Selma, N. C. yard engine	9:00 AM - 10:30 AM
July 9—Selma yard engine	5:00 PM - 5:45 PM
July 14—Selma yard engine	
July 15—Asheville Division work train from Hayne to Asheville	10:00 AM - 5:30 PM
July 19—Canton, N. C. yard assignment	7:00 AM - 8:45 AM
July 19—Charlotte, N. C. Trade St. Assignment	11:00 PM - 2:00 AM
July 20—N. Charlotte assignment	7:00 AM - 9:00 AM

Prior to July, 1959, the practice of the defendants in employing firemen in the operation of locomotives was to employ men who were literate, who were equipped with a watch approved by a defendant official, had passed a physical examination and met prescribed physical standards, had passed an examination on the defendant's book of Operating Rules, and had made some number of trips to learn the road prior to being designated "firemen" or "helpers."

The defendants represented to this Court that compliance with this Court's order of May 29, 1963, would require them to employ a minimum of 135 additional firemen and perhaps substantially more than that number.

Since the date of that order the defendants have employed about 90 additional employees, whom they designate as firemen or helpers. However, these men have not had physical examinations, have not had an examination on the book of Operating Rules and have no knowledge of the contents thereof, and do not have an approved watch. They are not familiar with railroad signals nor with diesel locomotives and have no knowledge essential for the purpose of detecting or correcting malfunctions. Some are illiterate, some are feeble, some are color blind, and all are assigned without previous experience or training. All are over 60 years of age and they range in age up to 85 years. Some are retired from other employment, and some have been retired because of disability.

None can perform the normal functions of a Diesel helper as they were performed by a fireman or helper prior to July 1959. Each has been instructed by officials of the defendants to perform no function except to sit on the engine and not get off the seat normally occupied by a helper until the run or shift is completed. They perform none of the functions performed by firemen and helpers prior to July 1959 and after that date when firemen or helpers were employed. They do not observe or pass

signals or the position of switches to the engineer. They do not observe gauges. They do not detect or correct malfunctions, for they do not enter the engine rooms of the Diesel locomotives. When these functions are performed they are performed by railroad officials, such as a road foreman of engines or a trainmaster.

While these men were being hired, without qualifications or ability to perform the work of helpers, the defendants rejected the applications for employment by qualified, experienced helpers, who had previously performed work on other railroads that have been taken over by the defendants and who lost their employment because of such take-over.

RALPH L. McCOLLUM
Ralph L. McCollum

STATE OF OHIO }
COUNTY OF CUYAHOGA } ss:

Subscribed and sworn to before me this 8th day of August, 1963.

RUSSELL B. DAY
Russell B. Day
Notary Republic

My Commission is State Wide

My Commission expires _____

**Answer to Motion for Issuance of Order to Show Cause and
for Judgment of Contempt**

Come now the defendants by their attorneys and move the Court to deny the plaintiff's Motion For Issuance Of An Order To Show Cause And For Judgment Of Contempt, and as grounds therefor respectfully refer the Court to the attached Affidavit of Lawson G. Tolleson.

Respectfully submitted,

HAMILTON AND HAMILTON

By /s/ THOMAS A. FLANNERY
916 Union Trust Building
Washington 5, D. C.

BURTON A. ZORN
LARRY M. LAVINSKY
SAUL G. KRAMER
300 Park Avenue
New York 22, New York
Attorneys for Defendants

Affidavit

LAWSON G. TOLLESON, being duly sworn, deposes and says:

I am Assistant Vice President of Labor Relations for each of the defendants herein (hereafter "Southern") and offer this affidavit in opposition to the plaintiff's motion to punish Southern for civil and criminal contempt.

Over 31,000 freight trains and yard engines were operated by Southern between June 29, 1963 and August 12, 1963. In only isolated instances, most of which occurred prior to July 4, 1963, have any of those trains or engines been run without a fireman. All passenger trains have been run with a fireman.

To comply with the Court's order, Southern:

(1) Hired 67 firemen formerly employed by the Central of Georgia Railway;

(2) Telegraphed all of its 140 furloughed firemen advising that positions were available outside of their home seniority districts, with the result that 10 firemen were put to work;

(3) Hired 223 new firemen for road or yard service; and

(4) Issued instructions to the effect that all trains and engines were to be manned by firemen as required by this Court's order.

To the best of my knowledge, Southern has complied with the order of this Court and will continue in all respects to do so.

Many of the assertions contained in the affidavit of Ralph L. McCollum, offered in support of this motion, are incorrect, or are not germane to this proceeding, or both. I respectfully submit that plaintiff's charge that "the defendants are wilfully in contempt of this Court's order" is totally unfounded and that this motion should, in all respects, be denied.

LAWSON G. TOLLESON
Lawson G. Tolleson

Sworn to before me this
21st day of August, 1963

GRADY A. HODGES

My Commission Expires April 14, 1965.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2881-62

BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEERS, *Plaintiff*

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Defendants*

Stipulation

For the purpose of shortening and simplifying the hearing on plaintiff's motion for issuance of order to show cause and for judgment of contempt, and for the purpose of this proceeding only, it is hereby stipulated and agreed by and between the undersigned, attorneys for the respective parties hereto, as follows:

1. The defendants normally operate slightly more than 21,000 train and switching locomotive assignments per month, and the period since June 28, 1963 has been a period of normal operations in this respect.

2. Between May 29, 1963 and September 1, 1963, the defendants operated 46 locomotive assignments in road freight and yard service without employing thereon a fireman, taken from the seniority ranks of the firemen, as a member of the crew. The date and time of each incident, together with the run on which or yard in which it occurred, is set forth in Exhibit "A," annexed hereto and made a part hereof.

3. Between May 29, 1963 and September 1, 1963, the defendants operated one locomotive assignment in yard service for a period of four hours or more without employing thereon a fireman, taken from the seniority ranks of the firemen, as a member of the crew. This incident occurred on July 1, 1963, and involved an assignment on the Chamblee Switcher.

The parties will not in this proceeding make any further claims or offer any further evidence on direct examination or through cross examination, concerning the subject matter set forth in paragraphs 1 through 3. The parties will not in this proceeding make any further claim or offer any further evidence on direct or cross examination, regarding instances of operation of trains or switching locomotives wholly or partially (regardless of duration), without a fireman, taken from the seniority ranks of the firemen, being a member of the crew.

The parties agree that the facts set forth in paragraphs 1 through 3 are relevant and admissible in this proceeding.

With respect to the remainder of this stipulation, the parties reserve the right to object on any ground to any one or more of the facts therein stated.

4. Annexed hereto as Exhibits "B," "C" and "D," respectively, and made a part hereof, are certified copies of the docket entries or other appropriate court records showing denial of Southern's applications for a stay pending appeal, as follows:

1. Exhibit "B"—U. S. District Court for the
District of Columbia— May 31, 1963
2. Exhibit "C"—U. S. Court of Appeals for
the District of Columbia— June 21, 1963
3. Exhibit "D"—U. S. Supreme Court— June 28, 1963

5. On June 17, 1963, the defendants acquired control of the Central of Georgia Railway and assumed the performance of the yard work theretofore performed by that Carrier in Atlanta and Macon, Georgia, and in Chattanooga, Tennessee. Of the men holding seniority in the ranks of firemen employed by the Central of Georgia Railway 72 were added to the yard firemen's seniority rosters of Southern at those places and employed by defendants.

6. On June 24, 1963, Southern telegraphed all of its 140 furloughed firemen offering them employment outside of their home seniority districts pursuant to Article 26 (g) of the contract in effect between the parties, as amended. A copy of one such telegram which sets forth the text of all the telegrams so dispatched is annexed hereto as Exhibit "E" and made a part hereof. Ten of said 140 firemen accepted employment outside of their home seniority districts, reported and were placed in service.

7. Since June 28, 1963, Southern has hired 223 new men who were placed on the firemen's and engineers' seniority rosters and assigned to riding in the firemen's seat on diesel locomotives. Annexed hereto as Exhibit "F" and made a part hereof is a list showing the number of such men by seniority date. The seniority date is the date on which such men actually made a run or participated in a yard assignment in the firemen's seat. This date often does not coincide with the date of hire which is often earlier.

8. The men referred to in paragraph 7, above, were employed pursuant to instructions by Southern to hire men 60 years of age or over. Annexed hereto as Exhibit "G" and made a part hereof is a list showing the number of such employees arranged according to age. This paragraph shall not be deemed to preclude Southern from attempting to introduce evidence concerning the reason for these instructions.

9. The number of men on the July 1, 1962 firemen's and engineers' seniority rosters 60 years of age and over, arranged by age, is set forth in Exhibit "H," which is annexed hereto and made a part hereof. All engineers have firemen's seniority. Not all firemen have engineers' seniority. The names of all are listed on the same rosters.

10. All but one person on the July 1, 1962 firemen's and engineers' seniority rosters were hired below the age of 60, and most were hired between the ages of 21 and 45.

These rosters, however, do not show all of the firemen hired by Southern because the names of many of them were stricken from predecessor rosters for various reasons including death, retirement, dismissal, and the like.

11. Physical examinations were given to all firemen hired prior to July of 1959. No physical examinations were given to the men referred to in paragraph 7 and no physical examinations were given to the men referred to in paragraphs 5 or 6 at the times therein referred to or since then. Since April 22, 1960, when Article 26 (g) of the contract was amended, no firemen were given employment pursuant to its provisions at an away-from-home seniority district was given a physical examination as a result of being given such employment.

12. Firemen hired prior to July of 1959 were required to be equipped with an approved watch. None of the men referred to in paragraphs 5, 6 and 7 have been required to be so equipped.

13. Firemen hired prior to July 1959 usually made, without pay, not less than 3 trips and not more than 12 trips to learn the road or not less than 3 trips nor more than 10 trips to learn the yard before being assigned as firemen. The men referred to in paragraph 7 did not make any such trips before being assigned nor did the men referred to in paragraphs 5 and 6 make such trips at the times therein referred to or since then.

14. The men referred to in paragraph 7 were verbally told upon being hired by Southern that when employed they would have no duties to perform on diesel locomotives in road freight and yard service, other than to sit in the fireman's seat and these instructions have been complied with.

15. The following matters are not embodied in the collective bargaining agreement in effect between the parties

and have not been subjects for collective bargaining between them:

- A. Physical examinations and standards for new hires;
- B. Age of new hires; and
- C. Educational level of new hires.

This paragraph shall not be deemed to preclude the parties from attempting to introduce evidence concerning the practice of Southern in the period 1950 to 1959 with respect to these matters, except physical examinations, which is covered in paragraph 11, hereof and the age of new hires, which is covered in paragraph 10, hereof. Furthermore, this paragraph shall not be deemed in any way to extend to or affect, by implication or otherwise, any other subject matter which may or may not have been embodied in the contract or which may or may not have been a subject for collective bargaining.

Except as otherwise expressly provided herein, the parties shall be precluded from introducing any evidence, whether on direct examination or through cross examination, with respect to any of the facts set forth in paragraphs 4 through 15 of this stipulation.

BURTON A. ZORN

RUSSELL B. DAY

MILTON KRAMER

Dated: September 12, 1963

EXHIBIT "A"

Location	Assignment	Date	Time
Spencer-Asheville	Through Freight	June 29, 1963	7:10 AM - 5:50 PM
Spencer-Asheville	"	" 29, "	10:30 PM - 9:00 AM
Asheville-Spencer	"	" 29, "	1:30 AM - 1:20 PM
Asheville-Hayne & Ret.	"	" 29, "	4:30 AM - 3:55 PM
Statesville	Yard	" 29, "	6:30 AM - 2:30 PM
Statesville	"	" 29, "	2:30 PM - 10:30 PM
Hickory	"	" 29, "	4:00 PM - 12:00 MN
Palatka-Palatka & Ret.	Local Freight	" 30, "	9:00 PM - 5:00 AM
Chamblee Switcher	"	" 30, "	9:00 AM - 5:00 PM
Chamblee Switcher	"	" 30, "	5:00 PM - 1:00 AM
Chamblee Switcher	"	" 30, "	10:30 PM - 6:30 AM
Statesville	Yard	" 30, "	6:30 AM - 2:30 PM
Morristown Switcher	Local Freight	July 1, "	8:45 AM - 4:45 PM
Chamblee Switcher	"	" 1, "	5:00 AM - 1:10 PM
Bulls Gap-Asheville	Through Freight	" 2, "	12:30 PM - 6:45 PM
Inman-Inman & Ret.	Local Freight	" 3, "	3:30 AM - 12:20 PM
Asheville	Yard	" 3, "	11:00 PM - 7:10 AM
Hayne	"	" 13, "	10:30 PM - 6:30 AM
Hayne	"	" 13, "	11:00 PM - 7:00 AM
Hayne	"	" 13, "	12:00 MN - 8:00 AM
Greenville-Spencer	Through Freight	" 13, "	6:30 PM - 2:00 AM
Sigabee-Inman	Work Train	" 15, "	10:00 AM - 5:30 PM
Winston-Salem	Yard	August 19, "	4:00 PM - 2:00 AM
Asheville-Hayne	Through Freight	June 28-29, 1963	9:15 PM - 9:40 AM
Spencer-Asheville	"	" 28-29, "	10:30 PM - 8:30 AM
Inman-Greenville	"	" 28-29, "	6:00 PM - 1:11 AM
Inman-Greenville	"	" 28-29, "	9:30 PM - 8:10 AM
Richmond-Danville	"	" 28-29, "	10:30 PM - 6:00 AM
Palatka-Palatka	Local Freight	" 28-29, "	9:00 PM - 5:00 AM
Langdale-Simpson	"	" 28-29, "	11:55 PM - 6:10 AM
Pt. Valley-Inman	"	" 28-29, "	7:45 PM - 7:00 AM
Morristown Switcher	"	June 29, "	8:45 AM - 4:45 PM
Simpson Yard-Langdale	"	" 29, "	10:30 AM - 2:25 PM

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Location	Assignment	Date	Time
Palatka-Palatka	"	" 29 "	9:00 PM - 5:00 AM
Orange-Orange	"	" 29 "	7:45 AM - 12:25 PM
Danville-Richmond	"	" 29 "	10:45 PM - 4:20 AM
Durham-Keysville	"	" 29 "	12:30 PM - 5:55 PM
Pomona-Winston-Salem	"	" 29 "	8:30 AM - 3:55 PM
Chamblee Switcher	"	" 29 "	2:15 PM - 10:15 PM
Gainesville-Gainesville	"	" 29 "	4:00 AM - 12:00N
Chamblee Switcher	"	" 29 "	6:00 AM - 2:00 PM
Greenville-Inman	Through Freight	" 29, "	7:30 AM - 3:30 PM
Greenville-Inman	"	" 29 "	8:40 PM - 1:15 PM
Newton-Newton	Local Freight	" 29, "	8:00 AM - 12:05 PM
Asheville-Asheville	"	" 29 "	1:00 AM - 7:45 AM
Hendersonville-Hendersonville	"	" 29 "	12:01 AM - 9:00 AM

Excerpt from Exhibit "C"

6-21-63—Per curiam order denying appellants' motion for stay argued by counsel

Exhibit "D"

August 30, 1963

Harry Hull, Esquire
Clerk,
U. S. District Court for the
District of Columbia,
Washington, D. C.

Re: Southern Railway Co. v. Brotherhood of
Locomotive Fireman and Enginemen
Your No. Civ. 2881-62

Dear Sir:

At the request of counsel for the Southern Railway Company, you are advised that an application for a study pending Appeal in the Court of Appeals for the District

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of Columbia Circuit was filed in the above-entitled case on June 25, 1963. Opposition to this application was filed on June 27, and the matter was presented to the Chief Justice who on June 28, denied the application without comment.

Very truly yours,

JOHN F. DAVIS, *Clerk*
Chief Deputy.

EPC:tw

cc:

Hamilton and Hamilton,
916 Union Trust Building
Washington, D. C.

Exhibit "E"

**WESTERN UNION
TELEGRAM**

Charge to the Account of
CAK-12-004-73-E

Washington, D. C., June 24, 1963

B. L. Skinner
Route 3
Union, Mississippi

There are vacancies for road and/or yard firemen on following seniority districts: Washington Division (Alexandria, Va.); Richmond Division (Richmond, Va.); Charlotte Division (Greenville, S. C.); Columbia Division (Columbia, S. C.); Charleston Division (Charleston, S. C.); Asheville Division (Ashville, N. C.); Mobile Division (Selma, Ala.); Birmingham Division (Birmingham, Ala.); St. Louis-Louisville Division (Louisville, Ky., Princeton, Ind., and E. St. Louis, Ill.); GS&F Railway (Macon and Valdosta,

Ga.); GNO&TP Railway (Ludlow, Ky.); Carolina and Northwestern Railway (Hickory, N. C.). We desire to give these jobs to furloughed Southern System firemen. Our record show you are a furloughed fireman. Please advise me Western Union collect not later than noon Thursday, June 27, if you desire job as firemen on any of above seniority districts, stating your preferences as to locations.

L. G. TOLLESON,
Assistant Vice President,
Southern Railway System,
Washington, D. C.

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Exhibit "F"

Date	Number
Aug. 1, 1963	3
" 2,	4
" 3,	17
" 4,	4
" 5,	13
" 6,	18
" 7,	13
" 8,	12
" 9,	2
" 10,	1
" 12,	4
" 16,	1
" 23,	1
Total	223

Date	Number
June 28, 1963	1
" 29,	30
" 30,	31
July 1,	32
" 2,	11
" 3,	2
" 4,	3
" 5,	4
" 6,	3
" 8,	1
" 9,	1
" 10,	1
" 12,	2
" 13,	1
" 14,	1
" 15,	2
" 16,	2
" 18,	1
" 25,	1

499a

Exhibit "G"

Age	Number
58	1
59	2
60	49
61	31
62	22
63	17
64	16
65	23
66	13
67	13
68	9
69	5
70	5
71	7
72	3
73	5
74	1
78	1
Total	223

500a

Exhibit "H"

Age	Number
81	1
78	1
77	4
76	5
75	10
74	14
73	8
72	15
71	21
70	24
69	28
68	44
67	48
66	53
65	85
64	83
63	67
62	71
61	73
60	84
Total	739

PROCEEDINGS

6 The Deputy Clerk: Brotherhood of Locomotive Firemen and Enginemen versus Southern Railway Company, et al., Civil Action No. 2881-62.

The Court: All right, gentlemen.

Motion for a Judgment of Contempt

By: Mr. Milton Kramer.

Mr. Kramer: May it please the Court, as you know we are here on our motion for adjudgment of contempt and a rule to show cause why the defendants in this case should not be adjudged in contempt.

On May 29th, of this year, your Honor entered an order commanding the defendants to do certain things. What they were ordered to do is contained in Paragraphs One and Two of your Order. This order was entered after an extensive briefing, and after considerable deliberation.

In Paragraph One of the Order you said: "Defendants shall operate their locomotives in accordance with the actual operation of locomotives during the period prior to July of 1959."

Now that is referring to Diesel Locomoties. I have skipped certain words that bring out the sentence more clearly:

7 "Defendants shall operate their locomotives in accordance with the actual operation of locomotives prior to July of 1959."

In the second paragraph, you said: "The defendants herein shall maintain the status quo with respect to their operation of locomotives, and the use of firemen thereon, by following the same procedures employed by defendants and maintaining the same working conditions as were maintained by the defendants in the employment and application of Section Four of the Diesel Agreement during the period 1950 to 1959."

Now in Paragraph one you said they shall operate their locomotives in accordance with the way they actually operated them prior to 1959. The second paragraph you ordered them to maintain the status quo by maintaining the same working conditions as they maintained in the employment and application of Section Four during the period 1950 to 1959.

Now in the third paragraph you gave them thirty days to get ready to comply. Now what did they do? What did they do during that thirty days and thereafter? We have stipulated most of the facts. They asked your Honor for a stay and you denied a stay pending appeal.

8 Then they went to the Court of Appeals with a motion for stay, and the Court of Appeals denied a stay pending appeal.

They then applied to the Supreme Court of the United States for a stay pending appeal, at that time the Court was not in session, and the Chief Justice denied their motion for a stay pending appeal.

Since then they have hired two hundred and twenty-three people—this is all stipulated—they have hired two hundred twenty-three elderly people between the ages of sixty and seventy-eight. These people were told—and this is all stipulated—these people were told that they had nothing to do but sit on the locomotive and ride. Do nothing else. And it is stipulated that that is what they did—nothing.

Now we will have evidence to show how firemen were used or how locomotives were operated on the Diesels during the period between 1950 and 1959, which is the period which your Honor used as the base of how they should operate or how they should use firemen until the collective bargaining agreement is changed or interpreted differently.

9 That is the sole issue in this case. The sole issue is whether by placing a fireman on the locomotive with orders to do nothing, and is in fact doing nothing, is following the same procedures, maintaining the

same working conditions, and using firemen as they were used in the period 1950 to 1959.

Now how they were used then we will show by evidence. That is not stipulated. But it is stipulated that the firemen, since your order, these new firemen and only these new firemen were told to do nothing, and did nothing.

Now we prove our case in two ways: one, by the stipulation. I believe your Honor doesn't have it yet?

The Court: No, I have not. I have not seen it.

Mr. Zorn: We have not had it admitted.

Mr. Kramer: How about offering it now?

Mr. Zorn: I have no objection.

If you are offering it, I want to make a statement.

The Court: Now how do you want to handle this, gentlemen? You say that you are offering the stipulation at this time. I would think that it would be advisable for the Court to adjourn and have an opportunity to look at this stipulation.

Mr. Zorn: That would be satisfactory. I think,
10 however, it should be formally introduced and given some exhibit number, your Honor.

The Court: It will be.

Mr. Zorn: In that connection I would like to call your attention, if you come to read it, the fact, which you will see when you read the stipulation, that paragraphs one to three, both parties have agreed are relevant and admissible with respect to them.

With respect to anything beyond that the parties have stated in the stipulation that page two and I quote, "With respect to the remainder of this stipulation parties reserve the right to object on any ground, to any one or more of the facts therein stated."

Following that recital, you have paragraphs four through sixteen.

Mr. Kramer: Through fifteen.

Mr. Zorn: Yes, through fifteen. I just wanted to make that clear when you come to read it, and there will be,

your Honor, very serious objections on our part to the relevancy, the admissibility, and the admissibility of certain facts contained particularly in paragraph seven through fifteen. But we have stipulated the facts to save time, subject to your rulings on relevancy and admissibility. I just wanted to make that clear to your Honor.

The Court: Undoubtedly you will orally refer to the stipulation, and I will hear further from Mr. Kramer. But I thought before that, I should have the opportunity of reading this stipulation.

Mr. Zorn: By all means, your Honor.

Mr. Kramer: Recess for how long? An hour?

The Court: I don't know. I would say a minimum of thirty minutes, at least.

Mr. Zorn: Fine.

(Whereupon, there was a short recess, following which the proceedings were resumed as follows:)

The Court: You may proceed, Mr. Kramer.

Mr. Kramer: As I stated prior to the recess, your Honor, in our view the sole issue is whether what they have done, putting these men on engines and telling them to do nothing and they are in fact doing nothing, constitutes compliance with your order that they operate their locomotives the way they did prior to 1959; whether it constitutes maintaining the status that existed prior to 1959 in the use of firemen.

I suggest that placing a man on a locomotive and telling him to do nothing, and he is in fact doing nothing, is the same as not having anyone there at all. It is just as though they had hired no one, and had the fireman's seat empty.

Now your Honor has a stipulation which we agree contains a recital of facts. We do not agree on which of those facts are relevant, except for some of them, the first three paragraphs.

We submit that most of it is irrelevant.

Paragraph two obviously is a very important part of the stipulation, and we agree it is revelant; that is, that on forty-six occasions in a two-month period, just from June 28th to August 1st, two days more than two months, on forty six occasions they operated a train or a switching locomotive without anybody at all, without anybody whom even they call a fireman, being there. They just had no one there at all, in addition to the many thousands of cases where they had someone there with instructions to "do nothing". Now how they justify that is something we will have to learn.

The Court: That is forty-two thousand operations?

Mr. Kramer: No, no, no. Forty six operations, with no one. In addition to—

The Court: But you have stipulated that it is forty-one thousand per month.

13 Mr. Kramer: That is right.

The Court: So it would be forty-two thousand operations.

Mr. Kramer: That is right.

The Court: And there were forty-six instances where they did not have a fireman.

Mr. Kramer: At all. That is, no one whom even they call a fireman.

Now your Honor will recall the testimony we had at the hearing, the trial on the merits, the testimony was that such an incident occurred very rarely.

The Court: That was Mr. McCollum.

Mr. Kramer: Yes. That while such instances did occur in normal operations it was extremely rare, I think he said maybe two or three times a year.

The Court: And they didn't complain about that.

Mr. Kramer: They complained, sure.

The Court: But he didn't make a major issue of it.

Mr. Kramer: No. Generally there was some reason for it, like at the very last minute, I think he said, a man

who was supposed to report got sick and they couldn't get someone else in time and the operation couldn't wait. But

I think he said perhaps two or three times a year.

14 Here we have forty-six in two months; and they had thirty days to get ready for it.

I submit that paragraphs five and six are completely without relevance and should be rejected as evidence of any fact.

Paragraphs five and six are those that deal with the Central of Georgia situation, and leadmen who accepted employment under other conditions. What that has to do with whether that complied with your order is beyond me.

The issue here is did they operate their trains, their locomotives, with respect to firemen, the way they did prior to 1959. That is all. So those paragraphs are completely irrelevant.

Seven is relevant. That is two hundred twenty three men who they put on the payroll with instructions to do nothing, who in fact did nothing.

Paragraph eight of course is relevant. It points out, I think it indicates, virtually defines this Court's order or trying to make the Court look foolish, limiting their employment to men over sixty and up to age seventy-eight; without any qualifications they formerly gave physical examinations. You had to pass a physical examination to

be employed, even then weren't examined to see even
15 if they were color blind. They were required to have a watch approved by the railroad officials.

These men weren't even asked if they had a watch of any kind.

Paragraph nine I submit is completely irrelevant and has nothing to do with whether they have complied with this Court's order. It simply recites that there are men on the seniority roster, employed a long time ago, who are over sixty. Of course, that is so. But the relevance of that escapes me.

Paragraph ten is irrelevant. It simply recites the fact that all but one of the men on the seniority roster before this incident arose were hired before they were sixty, and almost all of them under forty-five.

Paragraph eleven refers to the physical examinations.

Paragraph twelve refers to the watch. They are relevant.

Thirteen and fourteen are relevant. They refer to what is called "cubbing". That is formerly before they would permit a man to run as a fireman he had to make some number of trips to learn the road, to learn what the locomotive was like. That was a uniform practice up until the time they hired these two hundred twenty three men who did no "cubbing".

16 Fourteen refers to what these new men were told.

They were told to do nothing, and in fact did nothing.

The other paragraphs are irrelevant and we object to them. That is, we object to four, five, six, nine, and ten.

Well, I don't really object—

Mr. Zorn: What are the numbers again?

Mr. Kramer: Pardon? Four, five, six, nine, and ten.

We say seven, eight, eleven, twelve, thirteen and fourteen are relevant, in addition to what we said in our stipulation.

Well, that will be our case. Our evidence will consist almost entirely of what these men, what firemen did in the period 1950 to 1959; what their conditions were. We will contrast that with what is in the stipulation and what they are doing now with these two hundred twenty three men and ask the Court to find that it is equivalent to having no one there, and certainly is not maintaining the conditions and using firemen the way they did in the period your Honor specified in the order.

Thank you, your Honor.

17 Mr. Zorn: If it please the Court, Southern is here charged with civil and criminal contempt of this Court's order. We submit that only one of the many

charges which plaintiff has made and is making here is relevant. Namely, the charge originally contained in Mr. McCollum's affidavit and referred to here again by Mr. Kramer, that Southern, and the language of the affidavit was, "Ran numerous locomotives without firemen after the effective date of this Court's order."

This claim, as you have already seen from your reading of the stipulation, your Honor, is not supported by the facts as is demonstrated by the stipulation, because the stipulation which you have read makes it very clear, first, that during the period between June 29, 1963, and the present date, Southern operated somewhat more as you have estimated quite accurately, more than forty-two thousand trains and engines, and of those forty-two thousand or more trains and engines there are only forty-seven overall total instances where a train was run either partially or completely without a fireman being assigned on the fireman's seat.

The stipulation further points out, your Honor, that forty-one of all of these great number of forty-seven violations, out of a total of more than forty-two thousand runs, that forty-one or more than eighty-seven per cent of these instances occurred prior to July 4, 1963, while Southern was making every effort to hire a sufficient number of men to comply with this Court's order, and to get these men on the job.

There is only one instance of running a train without a fireman, which has occurred since July 15th, and for the past three weeks up to the present moment they are unable to produce—and the stipulation makes clear—any single instance.

Now in the effort of having to go out and hire as many firemen as we did we submit on the main basic issue of non-compliance with this order this is the most de minimus and isolated kind of situation that you could possibly find.

Furthermore, what did Southern do to comply with your order? Mr. Kramer makes very light of the fact that on

June 24th, 1963, Southern telegraphed to all one hundred forty furloughed firemen, offering them employment outside of their home seniority districts. Because as your Honor pointed out in paragraph three of your order, your order was that we try to get them from our furloughed firemen first. If we couldn't, then we would have to
19 go out and hire new men. So we very diligently proceeded to canvass the ranks of all of our one hundred forty furloughed men. Ten of them, only ten of them, accepted employment. They were given notice under the telegram, which is part of the stipulation, to advise us within three days.

What else did Southern do? Since the effective date of your order, your Honor, we have hired a total of two hundred twenty three new men.

You may recall when we were here discussing the effect of your order and discussing various other aspects of your order, we made a wrong estimate. I think we told you at that time that in our judgment your order would require us to hire only about one hundred thirty five men. The fact is that your order, and as a result of your order, Southern has put an additional two hundred twenty three new men on its payroll as a direct result and in an effort to comply with this Court's order.

Now it would seem to us, your Honor, that these facts make it perfectly clear that we have made every good faith attempt to comply with the order of this Court, and except for these minor isolated instances, most of which occurred prior to July 4th, within the very first week of the
20 effective date of this order, Southern has in fact operated all its trains and engines with assigned firemen and certainly intends to continue to do so.

These facts, therefore, simply cannot support, in our judgment, the very grave and serious charges of criminal contempt which the Brotherhood makes here. We will buttress these stipulated facts with testimony with respect to Southern's good faith compliance with your order.

I think Mr. Kramer has already made it clear in his opening that these facts dealings with the operation of trains and the hiring of new employees, is not the reason, not the real reason why the Brotherhood is here today. Although their affidavits, attached to the motion to punish us for civil-criminal contempt contained a page and a half of so-called alleged violations by running trains without firemen.

I think it is fairly clear from Mr. Kramer's statement that he is kind of shying away from that in view of the fact that it is abundantly clear from this record that Southern did everything that it could possibly do, and has succeeded in getting complete compliance with the intent of your order with respect to putting men on locomotives.

Now Mr. Kramer has made it clear, in his opening, that that is not the reason why they are here today. Why
21 they are here today, your Honor, is to get this Court to decide to add to your prior order a number of conditions and a number of requirements which were never part and were never intended to be a part of your order, and which were never litigated in any way whatsoever in the case in chief.

And it is clear from Mr. Kramer's statements that he is asking this Court in this criminal contempt proceeding to proceed to try a new and different case in which you will then be required to determine and to establish what the pre-employment qualifications of men should be before they are hired as firemen, and what duties if any firemen should continue to perform on the locomotives of the Southern Railway System.

He has asserted that it was this Court's intention in in issuing its order to freeze the pre-employment qualifications and the content and character of the firemen's job as the Brotherhood claimed it was in 1959 and in earlier years.

But your Honor, there is one thing that is absolutely clear; none of these issues with respect to pre-employment

standards or with respect to work done by firemen was ever before you in the case in chief and the main action.

22 There was only one issue, and I think you know this better than any of us. There was only one issue presented to you through that long litigation, through the preliminary injunction hearings and through the final hearings. The only issue which was presented and litigated in that case, the case in which your order and in which you issued your order, was whether Southern was required to have a fireman on every Diesel locomotive, and to hire new employees as firemen in order to accomplish this. There was never even the slightest suggestion, your Honor, that you were being called upon or that this Court was being called upon to establish any employment qualifications with respect to age, with respect to physical condition, with respect to education or any other matter; nor was there anything in that case on which you could have made any decision, nor were you called upon to make a decision as to what work a fireman should do if any, and what work a brakeman should do, and what work an engineer should do. None of these things were ever presented in any form in that case.

Your Honor can search in vain through the pleadings, the voluminous affidavits, the numerous exhibits, the transcript of the testimony, the proposed order submitted by counsel, the briefs on both the preliminary and the final

23 hearing, for even the slightest intimation anywhere throughout that long litigation, the slightest intimation that these kinds of employment qualifications and/or the duties or work of firemen were ever in issue in any way whatsoever or in any form, character or fashion.

So we say that that litigation involved only one issue. There was never before this Court, there was never part of the record before this Court, anything having to do with the issue now sought to be injected, which we claim is completely irrelevant and inadmissible with respect to

the work or the nature of duties or anything of that character.

We submit, further, your Honor, that the record in that case is closed and is now before the Court of Appeals, and that it cannot be re-opened in this proceeding; and that further, with the record being closed, in this type of criminal contempt proceeding it cannot be supplemented by extraneous evidence such as the Brotherhood will seek here to adduce, and Mr. Kramer has said they will try to produce, and which we have said will be completely irrelevant, inadmissible and beyond the scope of this hearing.

Now I think your Honor's opinion makes it abundantly clear as to what was before you in that case and what the basis for your decision was, and what you meant when you used the terms "working conditions," and when
24 you used the terms "operation of locomotives."

I call your attention, your Honor, to this language in your opinion, after you had concluded that our dispute over the interpretation of Section Four was a matter within the exclusive primary jurisdiction of the National Railroad Adjustment Board, you further said that that Board is equipped to do it and this Court is not so equipped.

But you went on to say: "We merely hold that the defendant railroads are not entitled to act independently and effect a new interpretation of Section Four of their agreement, and thereby alter working conditions in contravention of Section Six of the Railway Labor Act."

Then you proceeded to define what you considered a change in working conditions. You said, and I continue:

"The change in working conditions to which we refer is not the defendant's refusal to hire additional firemen but rather their practice of operating locomotives without the services of firemen or a helper. It was the practice of the railroads to operate locomotives with a fireman or helper from 1950 through 1959, presumably because of their

25 understanding that Section Four of their agreement so required. It is not for this Court to say that this is required, either by agreement or by custom and practice. Neither is it for the Court to say that the language of Section Four requires that additional firemen be hired to replace those lost by attrition. These matters are for the adjustment board."

But in your very next paragraph, I think we come to the very heart of what your Honor had in mind and what your Honor's legal decision was here. Because you said,

"But it is clear to this Court that the practice of operating locomotives with a fireman or helper constituted a working condition within the meaning of Section 6 of the Railway Labor Act. The defendants are prohibited from changing this constitution until the Adjustment Board resolves the controversy over the language of Section 4 of the agreement of the parties."

Now I think your Honor, if you look back at the long litigation, the hearings, the arguments, and the briefs, I think you must agree with me that never throughout that case was there the slightest suggestion or the slightest piece of evidence or the slightest bit of argument in any form whatever with respect to what work firemen should do or what work they should not do; nor was there in that whole record any evidence or any argument or any suggestion that there was a violation by reason of certain standards, or imposing certain standards with respect to age, with respect to education, with respect to physical requirements. So it is perfectly clear to us, at least, and I think any reasonable man in the light of your opinion and in the light of the record, and in the light of your order, could construe this order on that background in only one way: that all your order required legally was that Southern operate its trains with a man assigned to the firemen's seat, and that what that man did and what his age was and what his previous qualifications were, was

26

certainly nothing that was before this Court at any time in the course of that case.

So we say that all of this evidence which Mr. Kramer thinks may be relevant—and he has gone through a number of the paragraphs of this stipulation, considered so relevant and so irrelevant—our position on that is the only things relevant in this case is the first three
 27 paragraphs of this stipulation and the other paragraphs that deal with up through paragraph seven, the provisions which deal with Southern's good faith compliance in going out and hiring men and assigning them into the firemen's seat on locomotives and operating its trains in that fashion. I think we have had good authority for that position, your Honor, because as much as forty years ago in the Terminal Railroad Association case against the United States, in 266 U.S., the United States Supreme Court said, and I quote,

“In contempt proceedings a decree will not be expanded by implication or intended beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read.”

That Supreme Court language is four-square in this situation. Your order necessarily must be read in the light of the issues presented, and the nature of the support for it, and the evidence which was before you, and there is not any evidence or anything suggested that it dealt with any matter other than assigning a fireman to a seat on
 28 the locomotive and not operating, and hiring new men if necessary and not operating locomotives without a fireman assigned.

So, we submit, your Honor, that this well-established doctrine is determinative here, and that any evidence which the Brotherhood, as it asserts here, may seek to introduce concerning anything dealing with employment qualifications or work or lack of work, of the duties of

firemen, and duties of firemen, is utterly irrelevant, is completely inadmissible, and in our judgment, your Honor, completely beyond the scope of this contempt proceeding.

I would like to call the Court's attention to the fact that the order in this proceeding was intended to maintain the status quo until determination by the National Railroad Adjustment Board of the dispute submitted to it by Southern on January 14, 1963. That, of course, your Honor will recall.

And as this Court knows, that submission which is part of the record of the case in chief, in no way touches upon the question of any pre-employment qualifications to apply to new persons to be hired, or to duties of firemen, if any. It simply raises the square issue which was before you and which you said should probably be before the Adjust-

ment Board, was whether or not we had an obligation under Section 4 of the contract to run every locomotive with a man assigned to the firemen's seat, and if we didn't have furloughed men in sufficient numbers to do that, whether we were required to hire new people to do it. That is the only thing that is before the Adjustment Board. The Adjustment Board's decision, your Honor, even if it should turn out to be favorable to the Brotherhood, will neither decide the content of a fireman's job nor the caliber of the man who should fill it.

We say that it was manifestly not the intention of this Court to freeze all the practices affecting firemen on our railroad into a 1950-1959 iron clad mold. There are literally hundreds of these practices, both formal and informal, written and unwritten. Many of these have been established by management. They have been retained by management. They have been modified by management. They have been deleted or eliminated by management, all, your Honor, without any consultation, without any negotiations with the labor organizations.

Certainly there is, and there must be a broad area for managerial responsibility and judgment in order to operate a modern, efficient railroad.

30 So we submit that the Brotherhood has raised that the matter which the Brotherhood has raised here falls squarely, that is those matters dealing with what a man should do or should not do, what qualifications they should have or not have, that these are matters that fall squarely, your Honor, within the area of basic managerial responsibility, and they have never been and are not now subject to any restrictions or control by labor organizations.

But even if the union here has some complaint with respect to our policies concerning these employment qualifications or duties or lack of duties, this we think must necessarily be the subject of a separate action before the Adjustment Board. As I have said repeatedly, your Honor, it did not place whatsoever in any form in this case in chief, and clearly it has no place in this contempt proceeding.

The Court: Well, Mr. Zorn, agreeing with you on that proposition, what do you say as to Mr. Kramer's point on behalf of the Brotherhood that the Southern has failed to hire any new firemen by giving a negative instruction to a man who is hired that he has no duty?

31 Mr. Zorn: We say, your Honor, and we will develop, that the question of what duties any particular craft or any particular employee should or should not do, is and always has been a matter for the determination or judgment of the management; and we say, and we will establish, that on the basis of a sound managerial judgment, based upon experience, that there is nothing which has previously been done by a fireman which cannot be done just as or more efficiently by a head brakeman and/or an engineer. Therefore, the decision as to what employees should do what is necessarily a management decision which cannot, which is not part of the collective agreement, which is not restrained by any provision of collective agreement, and which is something that in order,— and we'll show many cases which have been made by

management affecting other crafts and even more serious matters than this one—but this is a matter that we say is a matter for our judgment to decide who should do what, and is not a matter that comes within the scope of this proceeding. Because I don't believe, and I am certain that you don't believe, that when you tried the main case in issue there was anything whatever in your mind, because it couldn't have been in your mind because there was no record to establish that the fireman must do X, Y and Z, and couldn't do A, B and C. None of this was before your Honor. It couldn't have been, and you couldn't have intended it. Because there was no evidence and no
32 issue was raised as to what should be done or not done.

The basic answer to your question is: we think, that as we always have had, we still have, and that your order was not intended to interfere or to restrict us in exercising sound management judgment for the reasons which will be demonstrated to you in the testimony.

Finally, in summary, we submit that you Honor should not reach out, as Mr. Kramer suggests you should, to encompass matters which were never heretofore before you. Of course if your Honor should do that, as I have indicated, we stand ready to meet that, since this is a criminal contempt proceeding I have confined my answer to a general statement with respect of the nature of our proof. I don't intend to advise our adversaries in a criminal proceeding with respect to the details of that proof.

But since this is a criminal contempt proceeding as well as a civil contempt proceeding, I would like in conclusion to call your attention to an opinion of this District Court in United States against United Mine Workers of America, in 89 Fed. Supp. 179, where the Court said, and I quote,

"The defendant in a criminal contempt proceeding has the same protection as the defendant in any

33 other criminal case. He is presumed innocent until proved guilty, and the party seeking the conviction must prove him guilty beyond a reasonable doubt. In cases of civil contempt, proof need not be beyond a reasonable doubt, but it is incumbent upon the party seeking adjudication of contempt, to prove guilt by clear and convincing evidence, and not by a mere preponderance of evidence."

That is the end of the quote.

So, we submit that the Brotherhood here cannot, and indeed will not, shoulder this crushing burden of maintaining a contempt action in this proceeding, and that this Court on the record should find that Southern has in good faith complied with this Court's order.

Thank you.

Before I sit down, your Honor, I do want to call your attention to one item, and that is that Mr. Kramer gave you a list of paragraphs which he regarded as relevant or irrelevant, and as I pointed out to you earlier, we both
34 have differences on relevancy with respect to a number of these matters which will be argued, or which we will argue before we complete this hearing, and which we have already argued, as I think I have made our position abundantly clear as to what the only issue in this case, that is whether or not we are operating trains with new hires or old hires for the man assigned to the fireman's seat. I think that is the only issue.

But it was significant to us that in all of the paragraphs that Mr. Kramer discussed he did not discuss or indicate to you the relevancy or irrelevancy of paragraph fifteen, the last paragraph of the stipulation, which deals with the general areas of physical examination, standards for new hires, the age of new hires, and the educational level of new hires, which, of course, we say is completely irrelevant. But I think it is significant that many of the things contained in Mr. McCollum's original affidavit which was submitted here as the basis for this contempt proceeding, do talk about these very things which Mr.

Kramer has not even taken a position, as yet, as to whether he regards relevant or irrelevant.

Mr. Kramer: Your Honor, I believe that Mr. Zorn was slightly inaccurate when he described what the issue was in the trial on the merits, and what your Honor found to be the wrong they had committed. The issue in this
35 case was whether Southern unilaterally changed working conditions by operating trains without a fireman. The issue was whether the operators of trains without a fireman was a change in working conditions, and you Honor found that it was a change in working conditions, and since it was done unilaterally, it was in violation of the Railway Labor Act.

Now what did you consider operating a train without a fireman to be? Mr. Zorn read one sentence when he was quoting from your opinion, very quickly. I would like to read that sentence again:

"The change in working conditions to which we refer is not the defendant's refusal to hire additional firemen, but rather their practice of operating locomotives without the services of a fireman or helper."

What you found was that operating locomotives without the services of a fireman or helper was a change in working conditions. Whenever any one of these two hundred twenty three men goes on a trip, that locomotive is operated without the services of a fireman, because these men had been told by Southern management to do nothing, and they do nothing. It is just as though they weren't there at all.

Now Mr. Zorn goes on to say that this work in
36 the judgment of Southern officials can be done by others. Well, what he is asking you to do there is to re-try the merits of the case that has been before an emergency board and that is going to be before a special arbitration board. He is asking you to decide whether the services of a fireman are necessary. But that is not the issue. It was not the issue there. It is not the issue

here. Very obviously your Honor found, and all the railroads in the country recognize that operating a train without a fireman, without the services of a fireman, creates different working conditions than operating a train with the services of a fireman. They have told these men to give no services.

The Court: Wait, now, I don't follow that.

Mr. Kramer: In your opinion you found the change in working conditions to be operating a train without the services of a fireman.

The Court: But the Court did not imply what the services of a fireman were?

Mr. Kramer: No, you did not. But there were some.

The Court: Let's get the record clear, Mr. Kramer.

37 During the testimony that we have heard in this matter you have effectively and efficiently pointed out to this Court that the duty of the firemen was not relevant to the issue that was before the Court.

Mr. Kramer: The need for a fireman was not relevant. That is true.

The Court: Yes. That all of those questions, that the sole matter that this Court had before it was the interpretation of one clause of the agreement.

Wasn't that your position?

Mr. Kramer: The latter part was not. I was not asking the Court to interpret an agreement.

The Court: Well, weren't you asking the Court to exclude all testimony pertaining to the need—

Mr. Kramer: Oh, yes.

The Court: —or the duties?

Mr. Kramer: Well, the question of duties didn't arise. But I asked you to exclude all testimony concerning the need for a fireman, yes. That was not and is not before this Court.

The Court: All right.

38 Mr. Kramer: It was not in that proceeding and it is not in this proceeding, whether a fireman is needed or not is utterly irrelevant.

What is relevant is, did they use firemen before 1959, and are they using firemen when they put these 223 men on? Is that using a fireman?

The issue before you is not whether they ought to have a contract requirement to have a fireman, or whether they should not. That will be determined elsewhere. But was the change in working conditions to run a train without the services of a fireman, when theretofore it had always been run with the services of a fireman.

The Court: I understand your position.

Mr. Kramer: Now whether the work can be done by others is completely irrelevant. You told them to use firemen the way they were used in a specified period. Maybe the others can do the work. We disagree. But abolishing the fireman's job, which is what they have done with respect to these new men, is a change in working conditions. Those men might just as well be there, and for any practical effect they are not there, they did not comply with your order, they did not maintain the status quo in the employment and use of firemen as you directed them to do. They did not operate their locomotives in accordance with the actual operation of locomotives—I am reading your language—during the period your Honor specified.

If that is all there is to this case, I think that once we show how the locomotives were operated, how firemen were used in the specified period, it is conceded that it is not done that way now because now these firemen, the new firemen, do nothing. So those locomotives on which they are riding are not operated in accordance with the way they operated prior to 1959, and firemen are not used in the way they were used in the period prior to 1959.

Now the old men are still doing all of that work. They were never told to stop. They are still doing it. It is only these new men who have been instructed to do nothing; and who in fact do nothing.

If that isn't a violation of the order, I don't think I have ever seen a violation of an order.

Now with respect to the burden of proof, that is easy. Almost all of the facts on which we rely are stipulated. That is about as convincing a proof as one can produce.

Other evidence that we will have pertains almost entirely to what firemen actually did on diesels during the period 1950 to 1959, and I don't think that can be contradicted.

40 Mr. Zorn: I would like at this point, your Honor, perhaps it will save a great deal of time.

You have the facts with respect to the number of trains running without a fireman, the total number of trains, the stipulation with respect to the number of men we have hired in order to comply with your order, and as you have said, your Honor, I think there are very serious doubts in your own mind regarding the propriety or relevancy of anything having to do with the issue of what the fireman does or does not do.

Now I think it may save us a great deal of time—because you do have the stipulation—if I, at this time, move to dismiss this motion for criminal and civil contempt on the facts which you have already before you, and on what you, of course, know your order was intended to do, and how reasonable men could reasonably construe that order in the light of the issues which were tried before you.

So, I make a motion at this time to dismiss.

The Court: The motion to dismiss will be denied.

Mr. Kramer: Call Mr. McCollum.

Whereupon,

Ralph McCollum

41 was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Mr. Zorn: At this point, your Honor, may I have a rule on witnesses?

The Court: Yes, you may.

The witnesses on both sides will follow the Deputy Marshal.

(Witnesses excluded from the courtroom.)

Mr. Kramer: Your Honor, of course Mr. Zorn has a right to invoke the rule. But I suggest now that the witnesses are out it would save a lot of time if some of them at least were present, for this reason: if they were present I could ask them whether they heard Mr. McCollum's testimony, and what their own testimony, whether that coincides with their own knowledge or not. If I cannot ask a question like that, I would have a number of witnesses testifying to the same thing.

Mr. Zorn: Your Honor, this is an action for criminal contempt, and I will tell you now that in this type of action, I will make every effort to have every rule of evidence adhered to, and to make certain that a defendant in
42 a criminal case gets every right which he is constitutionally entitled to.

Therefore, I object to that suggestion.

The Court: All right.

Direct Examination

By Mr. Kramer:

Q. Will you state your name? A. Ralph L. McCollum.
M-c C-o-l-l-u-m.

Q. Where do you reside? A. Tuscumbia, Alabama.

Q. What is your occupation? A. Vice President of BLF&E.

Q. Are you the same Ralph McCollum who testified in this case, at the trial last February, I believe it was? A. I am.

Q. When did you become Vice President of the Brotherhood? A. August 1, this year.

Q. And what were you prior?

Were you an official of the Brotherhood prior to becoming

ing Vice President? A. I was Chairman of the
43 General Grievance Committee on the Southern Rail-
way, B or LF&E.

Q. In what period? A. January 1955 until July 31, 1963.

Q. And were you an official of the Brotherhood prior
to 1955? A. I was Chairman of our local grievance com-
mittee in Sheffield, Alabama, in Tuscumbia.

Q. For how long a period? A. From approximately
July 1944 until January 27, 1955.

Q. During the period that you were local chairman
were you also working as a fireman or engineer? A. Yes.

Q. When were you employed? By whom were you em-
ployed before you became general chairman? A. Do you
mean on the railroad?

Q. Yes. A. I was employed as a fireman on the Memphis
Division of Southern Railway December 16, 1939.

Q. Did you continue that employment until you became
general chairman? A. In the interim period I was
44 promoted to locomotive engineer, and performed
both services; as fireman and engineer.

Q. At the time that you were employed were you told
that you would have to meet certain educational require-
ments?

Mr. Zorn: That is objected to, your Honor, on the
ground that the issue of educational requirements is com-
pletely outside the scope of this proceeding. In the case
in chief there was never anything in connection with
educational requirements. What we are trying here is a
new and different proceeding. I object as vigorously as
I can object to the introduction of this type of evidence.

By Mr. Kramer: I believe it is relevant, your Honor, to
show what the Southern considered was necessary for a
man to be a fireman up until a couple of months ago; what
they then considered a man had to have to be a fireman;
what qualifications these new men do not have, obviously.

The Court: The stipulation submitted in the case, as
the Court understands, reads that age qualifications,

physical conditions have never been a subject of collective bargaining.

Mr. Kramer: That is right. Nor educational requirements been a subject of collective bargaining, that
45 is true. It has not been a subject of collective bargaining. But it is relevant for the purpose of showing not what we had a right to insist on that the Southern do. It is offered for the purpose of showing what the Southern considered a fireman; and if a man had to have a high school education to be a fireman, in their opinion—

The Court: Well, the only difficulty, as the Court sees it is that we are going into a question of changing times and conditions, aren't we?

When Mr. McCollum went with the Southern as a fireman, the Court would, from discussion had with you and with Mr. Zorn in this particular case, conditions have changed considerably, have they not?

Mr. Kramer: Yes, we will show with other witnesses that this condition continued in the fifties; up until 1959 when they stopped hiring firemen, a man had to meet certain qualifications in order to be considered a fireman, considered by the Southern to be a fireman.

Mr. Zorn: Your Honor please, you have very correctly stated the paragraph fifteen of the stipulation, specifically provides that this matter among others, of educational
46 requirements, has never been a part of collective bargaining and is in no collective bargaining agreement.

More than that, there was never any evidence whatever, nor was there any issue whatever in the case in chief, on which you issued your order, on which you could have issued an order which was intended in any way whatsoever to even touch on the issue of whether a man should be a grade school or a high school graduate or anything else.

That was simply impossible, and you obviously could not have intended that.

Now what is being sought to be done here is to get into an issue which is outside the scope of this proceeding, on a very rigid contempt kind of a situation, on matters which have no place in this hearing, and which should be excluded.

I say again, your Honor, that the only relevant issue before you on this contempt is the question as to whether or not we complied with the basic intent of your order of hiring people and putting them on our locomotives. If we failed to do that, we are in contempt. If we did not, we are not in contempt.

But these extraneous issues are trying a completely new kind of a case.

The Court: The objection will be overruled.

You may proceed.

47 Mr. Kramer: Would you read the question?

(Question read by the reporter.)

By Mr. Kramer:

Q. Mr. McCollum, when you were first employed by the Southern, were you told that you would have to meet any specified educational requirements? A. Yes, I was.

Q. What was it? A. I produced a high school diploma. In addition to that, I had to get a letter from the Superintendent of Public Schools to certify that I was the one to whom the diploma belonged.

Q. Mr. McCollum, the question was what were you told was a requirement. A. The minimum educational requirements—

Mr. Zorn: I am objecting. "Told."

By Mr. Kramer:

Q. Who told you that there was such a requirement? A. The superintendent of the Memphis division, Southern Railway.

Q. What did he tell you the requirement was? A. The minimum educational requirement was a high school diploma.

48

Q. Mr. McCollum, in the course of performing your services as local chairman and general chairman, did you have occasion to travel over the road and talk to the people you represented concerning their work and their problems? A. Yes. It was my duty. Not only did I do it, but I had to do it.

Q. And for how long a period did you personally work as a fireman or engineer on diesel locomotives? A. I don't remember the exact date the first diesel engine came to the Memphis division. But I was in service when it did. It was around 1943 or 1944, and I worked on diesel engines from that time until I assumed duties as General Chairman in 1955.

Q. Are you familiar with what firemen did on diesel engines in the period 1950 to 1959? A. Yes. I worked on them up to 1955, actually.

Q. Yes. What did a fireman do—

Mr. Zorn: That, your Honor, is objected to on the grounds already stated, as being completely irrelevant and wholly outside the scope of this proceeding, and as your Honor pointed out himself, what the firemen did or didn't

do was never before this Court and was never part
49 of the record on which this order was issued. We
object very, very vigorously to the introduction of
this testimony.

The Court: The objection will be overruled, and you will have the objection to all of the testimony pertaining to it. It will be a continuing objection through all of this testimony pertaining to it.

Mr. Zorn: Thank you, your Honor.

The Court: As the Court sees it, Mr. Kramer, there are two sides to this particular case. One is the question of operating trains without an engineer on the 47 occasions.

Mr. Kramer: Yes.

The Court: The other is this question now.

Mr. Kramer: There are two sides to the case; one involves those 46 or 47 occasions when there was no one

there, no one at all; and the other is whether the use or non-use of these 223 men, when they run doing nothing, constitutes operating locomotives and using firemen the way it was done in the period 1950 to 1959.

Those are two quite separate forms of contempt.

The Court: And there is a serious question in the Court's mind on this, not on the 47 instances but on the other propositions.

50 Mr. Kramer: Well, I hope to remove that doubt.

The Court: Well I would stay closer to '59 then, if I am with you.

Mr. Zorn: Your Honor, there is a further objection to the last question in addition to the ground already stated.

I don't recall the question, but I simply want to point out if the question has been asked and I am not sure now in view of this discussion, the witness can testify as to his own personal knowledge and observation. But he should not be permitted to testify to what he knows generally.

Mr. Kramer: I submit he should be permitted to testify to whatever he knows. Whether he knows it from observation or discussion or personal experience.

By Mr. Kramer:

Q. Mr. McCollum,—

The Court: Well now, Mr. Kramer, when you say, "discussion" you don't mean "discussion".

Mr. Kramer: I don't mean hearsay.

The Court: Not hearsay. All right.

By Mr. Kramer:

Q. Mr. McCollum, have the services that a fireman performed changed—

51 Mr. Zorn: That is objected to on the ground that it is a vague, general question. This witness can testify. He himself has stated, your Honor, that after 1955 he no longer worked on a diesel locomotive, and became an official of the union, as I understand his testi-

mony. Now these vague questions in this kind of proceeding it seems to me should be ruled out and ruled out completely.

The Court: The objection will be overruled. The witness may answer.

By Mr. Kramer:

Q. Have the services that a fireman performed changed in the period between 1950 and 1959? A. No.

Q. Have the services that firemen performed other than the 223 recent hires changed from 1959 to today?

Mr. Zorn: Objected to as leading. If Mr. Kramer wants to testify I have no objection. But I think we have a witness.

The Court: That objection is sustained. Counsel can rephrase the question.

By Mr. Kramer:

Q. Have the services that firemen performed changed from 1959 to today?

52 Mr. Zorn: Same objection. It is exactly the same question.

The Court: There being no jury here, the Court will weigh it, and the witness may answer the question.

By Mr. Kramer:

Q. Have the services that firemen performed when they performed services changed from 1959 to today? A. Yes, they have.

Q. In what respect? A. The newly hired firemen that were employed on or after—

Q. Mr. McCollum, I am not talking about newly hired firemen or old hired firemen. I am just talking about the services that firemen performed. A. They have not changed.

Q. Now what does a firemen do when he first comes on duty? Or what did he do then in a period— A. When a

fireman reports for duty he is first required to check the bulletin boards for any changes in rules or instructions or the manner in which the job may be performed. After he checks the bulletin board—

Q. Checks the bulletin board for what? A. Well
53 bulletins are posted that directly effect the operation of a train, posted on that particular trip, depending upon the effective date of the bulletin. That is the reason he is required to read the bulletin board before going to work.

For example, a bulletin is posted requiring enginemen to check seals, all seals on a diesel engine. If he should not read that bulletin and arrive on the end of his trip with a seal broken, he would be charged, of course, with responsibility for that seal. That is just one example of why it is necessary to read the bulletins.

And of course operating rules are changed by bulletin.

Q. Mr. McCollum, what is a slow order? A. That is an order delivered to a train and engine crew limiting the speed to certain maximum miles per hour between certain points on the trip or line.

Q. Why are such orders issued? A. For several reasons. During heavy rains or high waters or building bridges, or derailments that has disturbed the railbed, curvature of track, operating through city limits. Any number. You could go on for 40 or 50 reasons.

Q. Are those orders posted on bulletin boards?

A. I assumed you had reference to a train order,
54 which is given to the crew before and during the trip. Now orders similar to that could be included in a bulletin.

Q. When it is included in the bulletin, is it applicable to a particular day or particular run or particular week? A. Each bulletin posted has an effective date. It is applicable until it is cancelled.

Q. What does he do next? A. Well, the fireman, after reporting to the engine?

Q. Yes. A. We would check the engine supplies which include fuel, sand, engine cooling water, and in the case of a passenger locomotive water for the steam generator which furnishes steam heat in the winter and air conditioning in the summer. He would check the lub-oil in the diesel crank case, in the air compressor crank case; he would check for any broken seals, for any controlled or air connections between units and multiple unit operations that might be improperly connected. He would check for flagging equipment which includes flags, fuses, torpedoes, red lanterns.

Q. State what a fuse is. A. A fuse—

55 Q. I didn't hear it until yesterday. Spell it. A.

F-u-s-e-e. That is close.

Q. What is it? A. It is a red flare that you can light by breaking off the top and striking it as you do a safety match. It has a slow burning powder that gives a red glow that is used for a stop signal on the roads.

Q. Proceed. What does he do next? A. Well, he would be required to check the hand brakes to be sure they were released before the engine was moved.

Q. Who releases them? A. The firemen.

Q. Proceed. A. He would also check engines for flat wheels and so forth, broken seals, which bulletins require be done.

Q. Why is that done? A. A flat of a certain length or depth—

Q. No, I am talking about the seals. Why must the seals be checked? A. Simply because they posted a bulletin that you must do it.

56 Q. Why are seals broken? A. Well, in the event of an emergency, a fireman could be in the engine room and detect cars running on the ground, or a very dangerous situation which required immediate action in which he wouldn't have time to go through the engines and warn the engineer. Each emergency brake valve in the units has a seal. This would be necessary to break that

seal in order to make an emergency stop to prevent what could be a serious accident or derailment which could result in loss of property and life.

Q. Are there seals on other industries? A. The automatic brake in the trailing "A" unit, if they have one, is ordinarily sealed. The governor on each locomotive engine is sealed. The M-valve is sealed.

Q. What is an M-valve? A. An M-valve is an air valve that supplies air to at least three important safety devices on a locomotive, including train control, dead engine feature, and speed recording.

Q. Does he check the seals of all of these industries or devices? A. That is necessary. We have had men dismissed from service when they arrived at the terminal and the seal was broken and they couldn't show that it didn't happen en route.

57 Q. Does he check other things? A. Yes, he would check the engine further before leaving to be sure that he had re-railers which are used if you have a derailed car; and chains to pull in a disabled car, if you have a draw head or coupling failure. He would be, of course, required to check the auxiliary generator to be sure that the fuses and so forth are good, that the auxiliary generator is supplying electricity to maintain batteries and all electrical appliances on the locomotive; in many instances, the engine is not operating upon reporting, and he is required to actually start the diesel engine.

Q. How does he do that? A. First the controls must be set in the proper position to start, and then the engine cranked by a starter button quite similar to that on an automobile.

Q. Is that done once for the entire locomotive, or is each unit done separately? A. Each unit is done, must be started individually.

Q. What is a unit? A. A diesel unit is a self-contained power system. In other words, each unit will handle its own cars. There is one distinction in what is termed a

58 B-unit which doesn't have the regular controls such as automatic brake and the throttle that would be used for multiple-unit operations.

Q. How many units would there be on a locomotive? A. A locomotive consists of one to ten or more. Ten or more units.

Q. And how many motors are there in a unit? A. You mean diesel engines?

Q. Yes. A. Ordinarily one. Some of the passenger locomotives have two.

Q. Did a fireman then and does a fireman now start any additional powered units on passenger trains? A. Well, it is necessary to start the steam generator, to fire it up and maintain the required steam pressure for heating in the winter and air conditioning in the summer.

Q. And who does that? A. The fireman.

Q. To start these various motors, to which you referred, does a fireman go back into each unit or can he do it all from the cab? A. Each unit must be started individually, and on all units similar to what is known as the F-7, it is necessary to enter the engine room of each individual unit.

Q. What else does a fireman do before the engine starts?

A. I don't know what all we have got so far.

59 Q. Mr. McCollum, are there devices on a locomotive for cutting-in or cutting-out one or more of the rear units of the locomotive? A. There are.

Q. Does a fireman do anything with respect to that device? A. That is necessary on many, or it could be necessary on every trip if he had more than one unit.

Mr. Zorn: Your Honor, please, at this point I know that Mr. McCollum, I think, has a set of notes, and from time to time he seems to be reading from his notes. If his recollection is not clear enough to be able to testify without them, of course I would have no objection. But it should be established as to whether I am correct.

Q. Mr. Kramer: Do you have some notes?

The Witness: I have a copy of the Fireman's Agreement of the Southern Railway and just a few notes I made

this morning on some statements Mr. Zorn made and some others on these things. I don't really need them.

Mr. Kramer: You look at them if you like.

By Mr. Kramer:

Q. Mr. McCollum, in the period we were talking about, and when a fireman performs services, does he leave
60 the train orders? A. Not leave. He said read. I am sorry.

Q. Does he read the train orders? A. Yes, it is absolutely required. Not only that he read them but that he understands them.

Q. Now after the engine starts, what does a fireman do? I mean after it starts moving? A. He then first would check to be sure the engines loading. If he has more than one unit, that they are all operating. He would check the oil supply, the oil pressure, rather, to be sure that the engines are working properly, and then any other general things that might occur in engines such as leaky pipes, or broken electrical connections, or things of that nature.

In addition to that, as the engine moves he must keep a lookout for switches, signals, that is electrical signals or signals from members of the crew given from their positions on the ground directing the movement of the train.

Q. And when he observes a signal, what does he do?
A. Relays the indication to the engineer.

Q. Will you go on with what he does after the engine has started? A. Well during the trip, of course, he
61 watches all automatic signal indications, train order board indications. He checks the engines for proper operation, correcting any malfunctions that may occur en route that are possible to correct on line of road.

Q. Will you describe malfunctions that occur that the fireman corrects? A. Well, there are many of these. There are several relays on an engine such as the ground relay which opens when there is a short in the traction motor. That is a motor that actually propels the train. This traction motor can be isolated and the engine continue to

operate with the three remaining motors; or the short might or could possibly be found and corrected. There are fuses that frequently blow that require replacing, to the lighting system control; fuel pump; generator field; any of these fuses that blow would completely stop or seriously hamper the operation of the engine, and these must be repaired en route. This is definitely the fireman's duties because we have many cases where they have been dismissed from service for failure to detect one of these fuses that were defective while the train was en route.

Q. How is the engine cooled? A. The engines are water-cooled. They have radiators such as that on an automobile, only larger in proportion, and the air is
62 forced through these radiators by electrical fans, formerly mechanically operated fans.

Q. Did or does the fireman perform any services with respect to that? A. Many malfunctions occur in connection with the engine-cooling system. A bell will ring, and a hot engine light comes on in the cab. The fireman must first determine which of the several units in his locomotive is affected.

Q. Does the light indicate which unit is affected? A. No. It just indicates hot engine. Five, six or eight, it could be any one of the six or eight.

Q. What does the fireman do then? A. He determines first of all which unit it is by checking the water temperature gage. If the gage is above a hundred and eighty or ninety, it will register a hot engine. Then if the fans are not running he may be able to block in the fan relay, or manually operate the shutters and cool the engine down where it can be used for the remainder of the trip.

Q. Is it necessary for him to leave the cab and go into the engine, or the unit to do that? A. Yes, it is.

Q. Will you give some additional services a fireman performs while the train is in motion? A. The fireman
63 is required to look the train over. By that we mean look out the window—

Q. Mr. McCollum, I did not ask you what the fireman is required to do. I asked you what he does. A. The fireman looks out the window, over the side of the train for derailed wheels, for hot boxes, for dragging equipment under any car that can be detected from the engine, or a car that is possibly on fire. We have had many cars hauling compressed cotton for instance, that are very susceptible. All or any of these things and others that can be detected from the engines, he is required to call this to the attention of the engineer or take other action to stop the train for an on-the-ground inspection and correction, if it can be done by other members of the crew, and many times he would assist them.

Q. Do these malfunctions or other disorders that you have described occur all the time on all trips? A. I wouldn't say all trips. But it is necessary that you look at all times or you wouldn't know whether it did occur.

Q. Well how often do they occur?

Mr. Zorn: May I ask whether this witness, in answering that question, is familiar with every trip which is run on this railroad over a period of whatever time he is testifying to? If he is not, obviously he is incompetent to answer that question.

Mr. Kramer: He can certainly talk from his own experience.

By Mr. Kramer:

Q. What percentage of the trips—

Mr. Zorn: He hasn't had any experience since 1955, he said.

The Court: Yes.

The Witness: It would be very difficult to give a percentage of the trips. But it is a frequent thing for malfunctions to occur in the running gear or boxes or load-shifting on cars and trains and so forth which the fireman is required to watch for.

Mr. Zorn: May I move to strike that answer on the

ground that no proper foundation has been laid for this witness to testify?

Mr. Kramer: I didn't hear it.

The Court: The objection is that no proper foundation has been laid for the answer.

Mr. Kramer: I didn't hear the answer. I would like to have the question read.

The Court: All right.

(Question read by the reporter.)

65 By Mr. Kramer:

Q. Mr. McCollum was a fireman for a long time. He was an engineer for a long time and observed the firemen. So he knows when these things happen. At least in his experience.

Mr. Zorn: As of today? As of last year? As of 1959, 1956? Or what year are we talking about?

Mr. Kramer: As of any period with respect to which he has knowledge.

Mr. Zorn: I suggest you ask him what periods he has personal knowledge.

By Mr. Kramer:

We covered that at the beginning when we first started on this subject.

The Court: The Court understands that it is up to '55.

Mr. Kramer: That he had personal experience as an engineer and fireman.

The Court: That is right.

Mr. Kramer: He has had observation since then.

The Court: The Court doesn't understand he has had observation since then. So you lay the foundation for that.

By Mr. Kramer:

66 Q. Mr. McCollum, have you observed the operations of diesel locomotives and the services performed by a fireman on diesel locomotives since 1955?

A. I have ridden locomotives since being General Chairman, on a permit by a superintendent or other officer of the carrier. In addition to that, I have handled hundreds of discipline cases involving firemen who were dismissed or their record had entries made on them for failure or alleged failure to detect these conditions. That is a fact because the carrier recognizes that when this is handled in negotiations with the superintendent, general manager and the personnel office in Washington. There are literally hundreds of those.

Mr. Kramer: I submit Mr. McCollum is qualified to testify to what a fireman does now, at least until August 1, 1963, as well as what they did up until 1955.

The Court: All right.

By Mr. Kramer:

Q. Did and does a fireman, oh well, I'll start over.

You stated that a fireman was given a copy of the train order, I believe? Did you state that? A. He must see and read the train order.

Q. And after having read it what does he do with respect to it? A. He is required to keep it in mind and discuss it with the engineer and call to the engineer's attention if he is not complying with the provisions thereof.

Q. Is it fireman or helper the man on the locomotive who on occasion first gets the train order? A. The fireman is the only person on the passenger locomotive that gets the order. On the freight locomotive most all the time.

Q. When you said "catch the train order" what did you mean? A. I had reference to the order you pick up while the train is en route and you get these orders at speeds from ten to sixty miles an hour.

Q. How does he get it? A. The telegraph operator has a copy that is made much like a "Y". It has three clips, one on each end of the wire and one at the fork, that holds a string. The order is tied to this string. As the

train passes, the operator holds it up, the fireman runs the arm through the string, and it pulls out the order.

Q. Mr. McCollum, do trains occasionally make emergency stops between terminals or stations? A. Frequently.
68

Q. And what does a fireman do on such occasions? When they stop on the main line? A. Well, there are several things. If it were double track and the brakeman went back to determine the trouble on the train, he would be required to go ahead and flag approaching trains on the other main line. If it were single track—

Q. And does he do it?

Mr. McCollum, you said he is required to do it. Does he do it? A. We can cite cases where they were dismissed for alleged failure not to do it, and he does do it. In other cases he would go back and check all of his units to be sure that the emergency stop was not caused by an air pipe failure or some other failure on the diesel locomotive.

Q. Mr. McCollum, do particular units or motors stop while the train is in motion, without the train stopping? A. Frequently.

Q. What does a fireman do then? A. He would check, of course, first, if he has more than one, to determine which it is, and then after determining that, find
69 the trouble. Then it would be necessary to crank the engine or to start it, any term you care to use, and place it back on the line. That means put it back in power.

Q. Mr. McCollum, would you describe some additional services that a fireman performed and still performs when he performs services while the train is in motion? A. Should the engineer become incapacitated for one reason or the other, the fireman would take charge of the locomotive, stopping if necessary for the safety of the train and the crew.

Q. Mr. McCollum, does, is the engine sometimes used as a brake? A. These engines, the majority of them are

equipped with what is known as a dynamic brake, which is accomplished by using the traction motors and generators as the energy to turn them is breaking power.

Q. What happens to that engine? A. It is dissipated—

Q. Energy? A. It is dissipated through grids that are cooled by electrical fans. Very often these fans may not operate, or the jumper cable between units may cause failure to be done in the braking system. Any of these malfunctions that can be corrected en route is done by the fireman.

70 Q. If the electricity cannot be dissipated, what does the fireman do? A. Well, it would be necessary to either go out of dynamic braking, or he would cut out that particular unit, isolate it.

Q. What else does he do in motion?

Mr. McCollum, does a fireman perform any services if the engine should over-speed? A. If a diesel engine overspeeds, it is equipped with what is known as an over-speed trip that shuts off the fuel supply to that engine and shuts it down. In such instances the signal, the bell signal would sound and a light would come on and he would check the units for trouble.

Q. What does he do? A. After determining that it is stopped by the over-speed trip, it is necessary to re-set the engine, and place it back on the line. This can be done by the fireman, and is done by the fireman, without stopping the movement of the train. In many cases without even delaying the train.

Q. Does he go back into the units to do that? A. On all units such as previously mentioned, that of the continuous cab as the F-7, it is necessary. On the others you don't actually go in, you go down the running board. But

71 it is on the outside on that particular locomotive.

Q. Do the engines sometimes get an insufficient supply of fuel? A. Yes, fuel filters become clogged, and the engine starves for fuel. That could be determined by examining at the load road regulator. It is shows the the engine is in minimum field, many times this could be

corrected by turning the fuel purolator or removing the cartridge in the fuel filter.

Q. Does there occur failures in any lighting system such as signal lights or other lights? A. Yes. These lighting systems are protected by fuses or overload switches, and these can blow or trip. The light globes can burn out, and it is necessary to replace fuses, replace head light bulbs and so forth.

Q. After the train starts, and after it is in motion, and while it is going around the track, curving to the left, would the fireman perform any services with respect to the conditions of the train? A. That is the best opportunity for a fireman to observe the side of his train because of the curvature of the track, many more cars are visible than would be on straight—

Q. To observe what? A. To observe for hot boxes, 72 dragging equipment, a fire, sticking brakes, a car on the ground, a load shifted on a car. We have cases where loads have shifted and struck a steel overhead bridge en route and the crew were dismissed from service for failure to detect this car.

Q. Does a fireman perform similar duties with respect to trains that are passing on double track or passing track? A. When a crew is in a siding and an approaching train passes, the crew firemen and other members of the crew get on the ground and inspect the other train for any malfunctions that might not be detected by the other crew because of the excessive length of the train and it could be something directly under a car that could not be seen by the crew on that train, from the engineer nor from the caboose.

Q. If he observes anything wrong, what does he do? A. Well, there are several signals that he could give as the caboose goes by. You hold your nose for a hot box signal, or he could use his walkie-talkie radio to contact the crew and say "you have got a car under the ninetieth car of the train, stop and examine".

Q. Are units of a diesel locomotive added on or dropped off en route? A. Frequently.

Q. What does the fireman do with respect to that?
73 A. When a unit is picked up it is necessary to, in addition to making the manual coupling with the knuckles or the running gear, to put up, you control or jumper cable. If dynamic brake is used, a dynamic brake cable to connect the main reservoir air pipe, application and release brake pipes, sand pipes.

Q. When the fireman— A. And then it is necessary in picking that unit up if you are going to use it to start the engine and make all of the inspections that would be made if this unit had been used out of the initial terminal.

Q. Mr. McCollum, I think I did not ask you whether when you worked as an engineer and fireman, you worked in road service or in yard service? A. My seniority is in road service, and I worked there. But I did do emergency work in the yard.

Q. Now when the train comes to its terminal, the fireman comes to the end of his run, what does he do? A. As the train pulls into the yard, he does everything that he did during the trip, and, of course, he is a little more caution looking out because of the congested traffic, yard engines, numerous switches. After the train is yarded, ordinarily the engine is placed on a designated track. It is

74 necessary too, for the engineer of any malfunctions on any of the units that may have to be reported on the engine report form. In many cases they are required to shut down each individual unit, to set up a hand brake on each unit, to pull the battery switch, and other switches necessary in tying the engine up.

Q. Mr. McCollum, are the locomotives in the United States today the same or substantially the same as the locomotives that were used in the period 1950 to 1959? A. They are substantially the same. Some of them are larger.

Q. Do the same malfunctions occur now as occurred then? A. Basically, yes.

Q. Are the same adjustments made? A. Yes, they are.

Q. Are there the same number or more or less units on a locomotive now than in 1959, or in the period between 1950 and 1959? A. There are more.

Q. There are more units? A. Considerably more.

75 Q. Why are there more units on a locomotive?

A. They are handling longer trains, or heavier trains.

Q. What is about the maximum length of a train today?

A. On the Southern Railway, I don't know. But a particular train is operated on the Appalachian District consisted of 300 cars, the average length of fifty feet, some of them longer, possibly.

Q. By number of cars? A. Three hundred.

Q. What was the maximum length of trains in 1959? A. Well I couldn't say exactly. Some divisions handle longer trains than others. But—

Q. Was it as much as or less than three hundred? A. I would say it was less in '59 than it is today, on the average.

Q. Was it as much as it was in '59, in 1955, or less? A. I would say the trains were shorter in 1955 than they are in 1959.

Q. Were they the same in 1950 as they were in 1955? A. They were shorter in 1950 than they were in '55, generally speaking.

Mr. Kramer: No further questions.

The Court: All right.

76 A quarter of two, gentlemen. We'll adjourn at this time until a quarter of two.

(Whereupon, at 12:25 o'clock p.m., a lunch recess was had until 1:45 p.m. o'clock.)

AFTERNOON SESSION
(1:45 p.m.)

The Court: All right, gentlemen.

Whereupon,

Witness McCollum

the witness on the stand at the time of luncheon recess, resumed the stand and testified further as follows:

Mr. Zorn: Your Honor please, allusion has been made in the testimony to changes made by the Southern Railway System in its operating rules for firemen which became effective July 1, 1963.

I think it would save a great deal of time if I could ask Mr. Kramer at this point whether he would stipulate that this document, that which I show him, constitutes the changes in operating rules for firemen which became effective July 1, 1963, and that that document, by its terms, provides for the elimination of all duties, not merely by firemen newly hired but also does not require any of the older firemen to perform any duties whatsoever?

Now those rules make no distinction, your Honor, between new and old firemen.

Mr. Kramer: Speaking of?

Mr. Zorn: Speaking of freight and yard service.

78 Mr. Kramer: Your Honor, I am not questioning the authenticity. I do question its admissibility. I think it is totally irrelevant what the rules were then or are now is beside the point.

What your Honor's order required them to do was to operate now the way they were operating then with respect to the use of firemen.

The Court: It will be received in evidence.

Mr. Zorn: Thank you, your Honor.

The Deputy Clerk: Defendant's number one in evidence.

The Court: It will be merely for identification at this time. Are you introducing it?

Mr. Zorn: It would save time if I offered it in evidence at this time.

The Court: Very well.

(Defendant's exhibit number one was received in evidence.)

Mr. Zorn: Your Honor, I will give you a chance to look it over.

The Court: All right.

Mr. Kramer: Mr. McCollum wants to ask me something. May I speak to him?

79 The Court: Certainly.

You have no objection?

Mr. Zorn: Oh, of course not.

The Court: All right, you may proceed.

Mr. Zorn: At this point, your Honor, I would like to make a motion to strike from the record the testimony of Mr. McCollum. I will be very brief as to my reasons.

First, I think that Mr. McCollum's testimony with respect to the multifarious and multitudinous duties and aspects of a fireman's job I think highlights very vividly the very kind of thing that was the basis of our original objection.

In issuing this order, your Honor, this order was issued as you described it, as the greatest forewarder as coupled with the decision that the greatest dispute of the interpretation of Section Four of the Contract was for the National Railroad Adjustment Board.

The purpose of the injunction, as we see it, was so as to preserve the status quo and preserve and to avoid prejudice to one of the parties while the dispute which was submitted before the National Adjustment Board remained undetermined.

80 Now I have pointed out to you earlier there can be no difference about this; that the issue which is presented to the National Railroad Adjustment Board and the status quo arrangement, which we believe

was the basis for your injunction, is not in issue in any way which remotely touches the problem of the needs for firemen or the duties for firemen.

It touches only one subject, and that is whether or not we were required to operate all locomotives with an assigned fireman and hire new employees in order to do that.

So we say, first, that all of this testimony is wholly outside even the scope or purpose of your order, and is not involved in this proceeding and cannot possibly be involved in any subsequent determination which may be made by the Adjustment Board.

Secondly, what really is being sought here, since not a scintilla of this type of evidence was ever presented to you at any time through our lengthy hearings and through our long affidavits in connection with the preliminary matter, and in everything which has happened in the case in chief, there was not a single scintilla of evidence of anything even remotely resembling any thing like what Mr. McCollum has here testified.

Now really, what this gets down to is that whether it is described as the need for a fireman or whether it is
81 described as duties of a fireman, it makes no difference, because what is sought from you in this contempt proceeding is a determination that in effect if firemen performed duties in the past they are needed and they must be continued, and that anything that was done in the past with respect to firemen's duties is something which this Court should direct be continued in the future.

I submit your Honor, that that is not a question which can in any conceivable stretch of legal theory be brought into this proceeding.

That is a matter which was before a Presidential Commission. It was before various Emergency Boards. It is now pending with respect to the National Railroad situation before an Arbitration Board appointed by the President of the United States, and this very type of testimony, your Honor, is the kind of testimony that was presented

in great detail along exactly parallel lines, to what Mr. McCollum has testified to there on the issue with respect to the needs for employment of firemen.

I suggest, your Honor, that in a contempt proceeding, based on a record where there was not even a remote suggestion that you were being called upon to determine what a fireman should not do or what a brakeman should
82 do or should not do, and so on down the line, it is utterly irrelevant and should be stricken because it is wholly outside the scope of this proceeding.

I point out one further thing, your Honor: Mr. McCollum has testified here to a myriad of details with respect to all of the things that a fireman has done and has been called upon to do. Now if the contention of the plaintiff should be correct, this is what they are asking you to do: they are saying or asking you to simply, because a fireman did certain things back in the period between 1950 and 1959, those under your order must be preserved without change, regardless of management's judgment as to the performance more efficiently by the other employees, regardless of the introduction of new types of equipment which would eliminate these functions, regardless of any basic management reason which could change some or all of these duties, and they are saying here in effect, "Freeze Southern Railway in this proceeding to make certain that every fireman on Southern is required by the rules of of Southern to do precisely every detailed operation which he may have performed over the years;" not three-quarters, not one-half of it, not one-fourth of it, but everything a fireman has done.

Now obviously, your Honor, when you have stated
83 that, their position becomes utterly absurd, I think.

I say to you that if we get in that area, and if we have to meet this kind of testimony, we are here litigating a basic issue which has been litigated before a Presidential Commission, which will, be perforce, which will be litigated by an Arbitration Board because it is just exactly

this type of testimony on the basic question of whether firemen are needed or not. This is certainly not anything that you contemplated in the wildest possible stretch of the application of the order.

As a matter of convenience, your Honor, we mention this Presidential Commission Report, of which of course you can take judicial notice. I tell you first that the testimony with respect to that issue of the need for firemen is reviewed completely in that Report, and the conclusion of the Commission is that firemen are un-needed and unnecessary because other employees can do whatever work is necessary for efficiency and safety.

As a matter of convenience, if you would like to have that, I don't want to offer this as a formal exhibit, since you can take judicial notice of it, but I would like you to see it. This is precisely the kind of hearing that we are getting into here. (indicating).

84 So on these various grounds, I would suggest, your Honor, that we can most effectively dispose of this contempt proceeding by striking the testimony of Mr. McCollum.

I renew my motion in that respect.

Mr. Kramer: Your Honor, Mr. Zorn misconceives the purpose of the testimony which Mr. McCollum has given.

We did not introduce it to show the need for firemen. The question of the need for firemen is not before you, your Honor.

Last May your Honor ordered the defendants to operate their locomotives in accordance twith the actual operation prior to 1959. Now I think that order was properly put; was proper. He is attacking your order. He is asking you to reconsider the order.

I am not asking you to hold in this hearing that firemen are needed. I am asking you to hold that they are not operating their trains with respect to the use of firemen as they did prior to 1959, which is what you ordered them to do.

In order to show that they are not operating locomotives with respect to the use of firemen the way they did before 1959, I must show you what they did before 1959, and indeed what they are still doing with respect to most of their firemen. The rules have changed.

85 Your Honor didn't refer to their rules. I have not talked about what firemen are required to do or used to be required to do. All that I have had Mr. McCollum testify to is what firemen did. The language of your order "the actual operation."

The Court: Wait a moment.

Would you gentlemen come up here, please?

(At the Bench:)

The Court: Mr. Kramer, there is a question in the Court's mind on this, this being a contempt proceeding; and predicated on the fact that these men who are hired are not firemen. Can't they de-hire them in a matter of a day's time?

Mr. Kramer: They couldn't in ten years' time.

The Court: They had to hire new people.

Mr. Kramer: Yes.

The Court: Now you say that they didn't give them a physical. Well, supposing they give them a physical; that certainly wasn't in the order.

Mr. Kramer: No, it wasn't.

The Court: Now it was never the subject matter of collective bargaining.

86 Mr. Kramer: That is right.

The Court: Now whether they are color blind, that can be determined.

Mr. Kramer: It can be, but has not been.

The Court: No, but I say, it was not in the order.

Mr. Kramer: No.

The Court: Now why can't we see how many of these firemen can know whether it is a green or a red sign, whether they have a watch or not?

Mr. Kramer: I suppose we can determine it. But they are not interested in determining it.

The Court: In other words, the problem that the Court sees is, we are going into a voluminous field of testimony.

Mr. Kramer: The testimony is for the purpose of showing they are not operating the locomotives the way they did.

The Court: You see, anybody that they would hire would be perhaps objectionable to the Union. I don't know.

Mr. Kramer. No, no.

The Court: We didn't set down any standard.

Mr. Kramer: No.

87 The Court: Do you follow me?

Mr. Kramer: That is right.

The Court: Now we can set the standard today, let's say, that they be able to see red from green.

Mr. Kramer: And be permitted to see.

The Court: And that they have a watch.

Mr. Kramer: Yes.

Mr. Day: May I say something?

The Court: Now wouldn't that terminate—

Mr. Kramer: Your Honor, they won't permit them to see. They told them not to look.

The Court: Well, let them look.

Mr. Zorn: Some times they do look. Some of them do look. But they are not required to look. That is precisely the point.

The Court: Now we are going into a tremendous field of inquiry.

Mr. Kramer: That is right.

The Court: I don't know where the line of demarcation would be drawn. In other words, is it going to be forty, is it going to be sixty or sixty-five, or twenty-five?

Mr. Kramer: You mean, witnesses?

88 The Court: No.

Mr. Zorn: Age?

Mr. Kramer: Oh, I see.

Mr. Zorn: Yes.

The Court: Age. Now is it going to be a high school, a college diploma, or a Masters?

Mr. Kramer: I wouldn't ask your Honor to order them to do any of those things.

The Court: Now do they have to know trains? Those are the problems that confront this Court or me in listening to this testimony.

Mr. Kramer: I don't think those are necessarily problems. The question is not whether they can see, whether they can pass signals, whether they can repair malfunctions. But what do they do? Admittedly, they do nothing. I must contrast that with what they formerly did. It is what they do, not what they are required to do.

The Court: Would you be satisfied if the Southern said to them, "look"?

Mr. Kramer: If the Southern used them as firemen that would not be contempt. They are not using them as firemen and we are complaining about that. You told
89 them to use them as firemen and that is not what they are doing.

Mr. Day: They can't read, some of them can't. The point is if they were doing the work of firemen we would not be here.

Mr. Kramer: No, we wouldn't be here.

The Court: Well, you see, as I tried to point out, this comes to the posture where both you and Mr. Kramer very effectively pointed out that this was not a subject matter of inquiry. Now on that proposition, I issued the order.

Mr. Kramer: That is right. There was no need for it.

The Court: Now we come back and say there is a contempt of that order because the men employed are not qualified to act as firemen.

Mr. Day: Not only not qualified—

Mr. Kramer: Not permitted to act.

Mr. Day: Not permitted to act, your Honor.

Mr. Kramer: No, sir. They are not permitted to do a fireman's work.

Mr. Day: If the Judge's orders is going to have any substance, and compliance with it be anything but a
90 sham, these men should do the work of firemen.

Mr. Zorn: Let's just take a look at that, Judge. Some of these men obviously, they are told that they are not required to do anything, that they are not required, and not to do anything. Our rules have been changed to eliminate requirements. When the testimony is developed there will be very sound, good, basic management reasons for that decision.

Now it seems to me that in this kind of a contempt proceeding, as you yourself pointed out so well, where none of these things have ever been raised before, to ask us to change operating rules which have been always a matter for management alone and they have never been a subject of bargaining or consultation with the Union, as to discussion, is getting us down to a very, very difficult area in management responsibility and labor relations.

I say if they have any complaint about what we have done, the place to do that, the place to do that is to bring an action in which this kind of thing is brought forward and not to rely on the National, where nothing was ever suggested as to any matter raised in this proceeding.

I think this thing should be dismissed. If they want
91 to proceed with another action to determine what if anything firemen should do, that is their privilege.

But this contempt action is not the place for it.

Mr. Kramer: I agree with that. Your Honor is addressing himself as to whether you should have issued the order you did. You issued the order telling them to use firemen as they did then. He says they shouldn't have done it.

Mr. Zorn: Obviously there is nothing in that order or anywhere, or nothing on which the order is based which raised any of the issues which you are now seeking to inject here.

The Court: The Court is going to overrule the motion of the Southern at this time.

Mr. Zorn: Right.

The Court: And proceed with the cross-examination of the witness that is on the stand.

Now is the rest of your testimony cumulative?

Mr. Kramer: Very largely, almost entirely.

The Court: All right. Then supposing you put—

Mr. Day: We have thirty witnesses.

Mr. Kramer: I will use as many as you are interested on hearing.

The Court: Put on one on the specific contempt.

92 Mr. Kramer: That is stipulated. You mean the forty-six?

The Court: Well—

Mr. Kramer: That is stipulated. You mean the forty-six? That is stipulated. We don't have to prove that.

Mr. Zorn: The trainmen is stipulated. We have agreed there will be no evidence.

The Court: But if called upon are you going to introduce testimony as to the reason?

Mr. Zorn: Yes.

The Court: All right.

Mr. Zorn: We will put on testimony.

The Court: So you don't need to put on any testimony on that.

Mr. Kramer: Not on that, no.

Mr. Zorn: We will put on testimony that will satisfy your Honor that first we did everything to comply—and secondly, why we did what we did was for sound, managerial reasons, and not in any effort in a million years to flout your order.

The Court: Let's go ahead with the cross-examination.

The motion will be overruled.

93 (In Open Court:)

Mr. Zorn: Would you like to rule on the motion to strike?

The Court: Yes. The motion to strike or to dismiss this testimony, to strike the testimony of Mr. McCollum will be denied.

Mr. Zorn: Your Honor, in view of our basic legal position which I think has been made abundantly clear to you, I have no questions of this witness.

The Court: All right.

(The witness was excused.)

Mr. Kramer: Call Robert Gambrell.

Whereupon,

Robert Gambrell

was called as a witness for and on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kramer:

Q. State your name, address? A. Robert Gambrell, Birmingham, Alabama. G-a-m-b-r-e-l-l.

Q. How are you employed, Mr. Gambrell? A. When was I employed?

94 Q. How are you employed? A. At the present time General Chairman for the B.L.F. & E., Southern Railway.

Q. How long have you been such General Chairman? A. Since August first.

Q. Of what year? A. 1963.

Q. Did you succeed Ralph McCollum as General Chairman? A. I did, yes.

Q. Were you an officer of the Brotherhood prior to becoming General Chairman? A. I was Local Chairman in Birmingham on the A.G.S. Division.

Q. For how long? A. Approximately eleven years.

Q. During the time that you were local chairman were you also employed by the Southern Railway? A. Yes.

Q. Where? A. Birmingham, Alabama.

Q. In what capacity? A. As a Fireman-Engineer.

Q. When were you first employed as a fireman? A. June 10, 1941.

95 Q. And were you employed from then continually until 1963? A. Except for approximately three years spent in the Armed Services.

Q. When were you promoted to Engineer? A. 1946.

Q. When you were first employed what individual employed you? A. The Train Master.

Q. Did he tell you that he had any requirement with respect to education for employment by the Southern as a Fireman? A. He said that I would have to have a high school education and be over twenty-one years of age, and under twenty-seven.

Q. Were you given a book of operating rules? A. Yes.

Q. Were you given an examination on that book of operating rules before you were employed as a fireman? A. Yes.

Mr. Zorn: Your Honor, we understand that we have a running objection to this entire line of testimony, so that I won't have to interfere with this?

The Court: You have.

96 Mr. Zorn: Of all matters outside the basic issue of whether or not we violated in terms of trains running without operating firemen and so forth?

The Court: All right.

By Mr. Kramer:

Q. Have you had examinations on the book of operating rules since then? A. Yes. Every year.

Q. Every year. A. Yes.

Q. Are there any preliminaries prior to giving you the examination every year? A. I didn't understand that question.

Q. Are you required to do something else before you are given the examination? A. No.

Q. Are you given instruction or study yearly? A. We are notified to attend these classes yearly.

Q. To attend what classes? A. The Rule classes.

Q. And at the end of the classes are you given an examination? A. Sometimes we are asked questions. But seldom do we have written examinations.

97 Q. Are you given an oral examination? A. In the form of question, yes sir.

Q. Mr. Gambrell, with the services that you performed as fireman in 1963 substantially the same as the services you performed as fireman in 1959 and prior thereto? A. Yes, sir.

Q. Will you describe briefly what services you formed as a fireman in 1963, and in 1959?

Mr. Zorn: Excuse me. Was he a fireman in 1963?

Mr. Kramer: Sometimes.

Mr. Zorn: Sometimes. It wasn't clear from the question.

By Mr. Kramer:

Q. Have you performed work as a fireman in 1963? A. yes, sir.

Q. Have you performed work as an Engineer in 1963? A. yes, sir.

Q. When you performed services as an engineer did you notice the fireman's performance of his services? A. Yes, sir.

Q. Will you state what a fireman did in 1963 and in 1959? That is, beginning from the time you report for work, and describe that relatively briefly, please. A.

98 All right, sir. Of course, well, when a fireman is required to report for duty he is required to examine the bulletin books at the shops or round-house where he reports, and after checking the bulletin books and getting on the edge of them he is required to check the engine for supplies, to check the oil level in the crankcase, cables, connecting the various units to see that the engine is set up properly to be operated from the lead unit; to check flagging equipment, supplies such as nubbles, chains, fuses, torpedoes. Then after determining that he has the necessary

supplies, the engine leaves for the yard to connect with the train. On the way from the shop to the yard the fireman was required to watch the signals that the brakeman might give on his side, to observe the position of switches, to watch adjacent tracks to avoid sideswipes or coming in contact with other movements that might not be advisable or visible to the engineer.

After coupling to the train in the yard and departing for the road trip, the fireman is required to read the train orders, to keep them in mind, to call them to the attention of the engineer when necessary, to keep a lookout for hot boxes, sticking brakes, load-shifting, or any other condition that might affect the movement of his train, and call them to the attention of the engineer.

He is also required to pick up train orders, while moving, at telegraph stations where orders may be issued.

99 In addition, to these duties, he is required to check the performance of the locomotives and correct any malfunctions that might occur that it is in his capabilities to repair or adjust. These include numerous things; blown fuses, and engines catching on fire, ground relays kicking out, engines not loading, engine's failure to make transition; and engines running hot, cooling water temperature running hot; lubricating oil running hot.

This duty of course is performed all the way en route.

On arriving at the final terminal the fireman is responsible for the movement of his train and engine until the train is yarded and the engine is brought back through the yards to a tie-up track. Upon tying up at some points the fireman is required to shut down all of the units on a locomotive, sometimes as many as eight, pull the main battery switch and tie up handbrakes on each unit to see that the engine is secure.

That includes some of the duties of a fireman.

Q. Mr. Gambrell, did you perform services as a fireman in July of this year? A. No sir, I didn't.

Q. Did you observe firemen performing their services in July of this year? A. On July first, I did.

Q. Only on July first? A. That is the only day I worked on the property, in July.

Q. Is that when you had your convention, in July? A. That is right.

Q. Mr. Gambrell, were you at any time told by any official of the Southern that you should not perform those services any more? A. No sir, I was not.

Q. Are the engines, Diesel units that are used today, substantially the same as those that were used in 1959? A. Substantially so, yes sir.

Q. Do the same malfunctions occur now as occurred then? A. That is true.

Q. Are the same adjustments made? A. That is true.

Q. Are there some of these adjustments or corrections of malfunctions that cannot be made by a fireman unless the train is in motion? A. That is correct.

101 Q. Like what? A. Well, for example, an engine not loading. If the train was not in motion you would be unable to determine which engine was not loading because they would all be in idle position; the only way to observe if an engine is properly loading is for the throttle to be open and the train underway.

Q. What do you mean by "loading" or "not loading"? A. Well, on each unit, on each Diesel locomotive, a load regulator. This indicates where the engine is putting out its full power or not. When the engine is operating in full throttle you can observe, you can note by observing the load indicator whether or not that engine is putting out its full power, which may call for some adjustments to be made.

Q. Are freight trains about the same size now as they were in 1959, or are they different? On the average? A. On the average I would say that the length of freight trains has gradually increased since 1959.

Q. Is the number of Diesel units in a locomotive about the same? More or less than in 1959? A. Well I would say the number of actual units is more or less the same.

Mr. Kramer: No further questions.

102 Mr. Zorn: If your Honor please, I would like to make a motion to strike the testimony of this witness on the same grounds which I argued in connection with the striking of Mr. McCollum's testimony.

The Court: The motion will be denied.

Mr. Zorn: I have just one or two questions.

Cross-Examination

By Mr. Zorn:

Q. Mr. Gambrell, you are now the General Chairman, are you not, on Southern? A. Yes.

Q. For the Brotherhood of Locomotive Firemen and Enginemen? A. Yes.

Q. Now are all of the people who are members of your organization either firemen or engineers, in the sense that they do firemen's work or are capable of doing firemen's work? A. I don't exactly understand your question, Mr. Zorn.

Will you repeat that, please?

Q. My question is simply this, that you have certain qualifications for admission of a member into your
103 organization is that correct? A. That is correct.

Q. And in connection with those qualifications a man must, speaking only of firemen now, or helper, a man must be a fireman or helper and he must have the capacity to be a fireman or helper or have performed the duties of a fireman-helper before he can be admitted to one of your lodges in your organization, is that correct? A. He must be employed as a fireman or helper before he is eligible to be admitted.

Q. And you would then regard all of your members as being firemen and helpers, men who are members of your

Union. You would consider all of them to be firemen and helpers, those who are firemen or helpers? A. Yes.

Mr. Zorn: Thanks. That is all.

The Court: Any further questions?

Mr. Kramer: Yes, I do have.

The Court: All right.

Redirect Examination

By Mr. Kramer:

Q. Mr. Gambrell, for a man to become a member of your Brotherhood, does he have to have seniority as a fireman?

A. Yes.

104 Q. Does he have to have anything else? A. Not that I know of.

Mr. Kramer: That is all.

The Court: You may step down.

Mr. Zorn: Mr. Gambrell, excuse me. I have a couple of more questions.

Recross Examination

By Mr. Zorn:

Q. To be a member of the Brotherhood of Locomotive Firemen and Enginemen, a man must be on the seniority roster or a railroad, in this case Southern; is that correct?

A. Yes, sir.

Q. And he must be a man who is taken from the seniority ranks of firemen; is that correct? A. Yes.

Q. Now with respect to membership and qualifications for membership, you are now the General Chairman, and I assume, Mr. Gambrell, you have some familiarity with the constitution of the Brotherhood.

I direct your attention to Section 30 under the heading "30-A", under the heading "Qualifications of Applicants," and let me read it along with you. A. All right.

105 Mr. Zorn: I might ask counsel whether or not this particular section, which has nothing whatever

incidentally to do with any other issue, whether this particular section was amended in—

Mr. Kramer: What page?

Mr. Zorn: Page 90 of the 1959 Constitution.

Mr. Day: What is the Article and Section, and then I can give you this.

Mr. Kramer: Section 30-A.

The Witness: Article 8.

Mr. Zorn: Yes. Article 8.

Mr. Kramer: Are you limiting it to 30-A?

Mr. Zorn: Yes. 30-A. Only "A" now.

Mr. Day: No amendment.

By Mr. Zorn:

Q. Mr. Gambrell, Section 30-A provides that, "An applicant for membership must be actually employed as a locomotive fireman-helper-engineman, engine hostler, hostler-helper, engine dispatcher, and so on."

Now my question to you is, that when you apply the qualifications which are set up in Section 30-A, you do require, do you not, that every applicant for membership, in order to be admitted to your organization, must
106 be actually employed as a locomotive, fireman or helper, and so on; is that correct? A. Yes, sir.

Q. And you would treat anybody in your organization as being a fireman or a helper once he has been admitted to membership; isn't that right? A. Well, he would be treated with the same conditions that any member would be treated.

Q. I understand. But once you took him into your organization, so far as you are concerned, he is a real fireman; isn't that right? A. Well, I don't know exactly what you mean by a "real fireman," Mr. Zorn. I mean if he is on the seniority list, that may not necessarily mean he is a real fireman.

Q. It means, does it not, looking at your own constitution, that he has actually got to be employed as a fireman,

and as you use that term isn't it a fact that when a man is taken into membership in your organization, even though he may improve with experience over the years, nevertheless he has got to be a fireman to start off with to be employed as a fireman; is that correct?

Mr. Kramer: Objection, because Mr. Zorn is telling Mr. Gambrell to answer a question on a supposition that the constitution has a certain provision. That sup-
107 position does not accord with fact.

The constitution which is not in evidence provides what Mr. Zorn says it provides, and then "An applicant for membership must actually be employed as a locomotive, fireman, helper, enginemen," and so forth.

Then he stopped short because it continues: "Or holding seniority rights as such."

It is "Or holding seniority rights, as such."

So if Mr. Zorn wants to ask Mr. Gambrell some questions on the supposition of certain constitutional provisions, the constitutional provisions should be given accurately.

Mr. Zorn: Well, now that the witness knows the answer, I won't pursue that any further.

By Mr. Zorn:

Q. I do want to ask you this though, Mr. Gambrell: Does your constitution and do your membership requirements for membership in your organization of Brotherhood, require that a man must be able to read and write the English language and understand your constitution?

Is that provision still in effect? A. As far as I know, it is still in effect.

Q. So that anybody who has been admitted to membership in your organization is a man who can read and write
108 the English language and that he is capable of understanding your constitution, correct? A. All that I know personally, yes.

Q. That is what your Constitution requires as you understand it? A. Yes.

Mr. Zorn: That is all. Thank you.

Mr. Kramer: No further questions.

The Court: You may step down.

(The witness was excused.)

Mr. Kramer: Call James Alfred Blackwelder.

Whereupon

James Alfred Blackwelder

was called as a witness for and on behalf of the Plaintiffs, and having being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kramer:

Q. Will you state your name and address? A. James Alfred Blackwelder, Junior, Richmond, Virginia.

Q. Mr. Blackwelder, what is your occupation? A. Locomotive and fireman-engineer, Southern Railway, Richmond, Virginia.

109 Q. Mr. Blackwelder, what is your occupation? A. Locomotive and Fireman-Engineer, Southern Railway, Richmond, Virginia.

Q. Are you a road fireman and engineer or a yard fireman and engineer? A. A yard fireman and engineer?

Q. Yes. A. A yard fireman and engineer.

Q. How long have you been employed as such by the Southern? A. Since October 1950. Except for four years which I put in military service from 1951 to 1955.

Q. Have you worked both as a fireman and engineer? A. That is correct.

Q. What official of the Southern employed you? A. Mr. I. Y. Cox, Train Master, Richmond, Virginia.

Mr. Zorn: May I ask Mr. Kramer whether the testimony of this witness will be substantially the testimony of the previous witnesses, and whether or not it is cumulative?

Mr. Kramer: It is cumulative except for a few little items, the most significant perhaps is that which Mr. Blackwelder is the first of the witnesses who was a yard fireman-engineer. Therefore, his duties as distinguished from a road fireman and engineer. Therefore, his duties are not quite exactly the same as the others. Substantially the same, but there are some differences.

Mr. Zorn: It is up to your Honor whether you would like to hear it. If you do, I have a basic objection also as to this testimony.

The Court: You may proceed.

By Mr. Kramer:

Q. What official employed you, Mr. Blackwelder? A. Mr. L. Y. Cox, Train Master, Richmond, Virginia.

Q. Did he tell you that there was an educational requirement to be met before your employment? A. That is correct.

Q. What did he say it was? A. I was required to have a high school education and was required to bring a high school diploma as proof of my graduation.

Q. You had to bring it to him? A. That is correct.

Q. Will you give us whether you were given a book of operating rules? A. Yes, I was.

Q. Were you given an examination on the book of operating rules? A. I was.

111 Q. Before working as a fireman? A. I was.

Q. Have you been given such examination since then? A. We are given a review each year and are required to attend it.

Q. And are you examined after attending the review? A. No, we are not, except for promotion, to rank of engineer. Then we are given an additional rule examination.

Q. Are you examined on the rules every year? A. We are given a review, a class review each year.

Q. Are you given that examination regardless of whether you work, I mean that class as you called it, regardless of whether you work as a fireman or engineer? A. That is correct.

Q. Are you paid for the time you attend the class? A. We are not.

Q. Will you describe briefly the services,—well, withdraw that.

Are the services that a yard fireman performs in 1963 the same as the services performed by a fireman in 1959? A. Yes, they are.

Q. Will you describe the services of a yard fireman? Briefly. A. Would you like for me to—

Q. Beginning from the time he reports for work. A. Reporting for duty we are required to check our bulletin books to see if additional bulletins have been posted, say like there have been trackmen working, and there is a track obstruction, we have to look out for them, and things of that nature.

We are to check the time with the engineer or conductor prior to going to work. We examine our engines for supplies such as fuses, torpedos, sand, water, lube oil, and see that our brakes are properly adjusted, and so forth and so forth, prior to going on duty.

Mr. Kramer: A moment before you resume.

Your Honor, I notice that the witnesses we have already used are in the court room. It is conceivable we will use them in rebuttal. If there is no objection, of course I will be glad to have them here.

The Court: The Court feels that they are entitled to remain.

Mr. Zorn: Pardon me. I am sorry? I didn't hear you.

The Court: The Court feels that they are entitled to remain at this time.

113 Mr. Zorn: My only question is if Mr. McCollum, for example, should be recalled, he would have the

benefit of the examination of the other witnesses. If you bear that in mind.

The Court: All right.

By Mr. Kramer:

Q. You may resume, Mr. Blackwelder. A. After checking our engine, fuel, supplies and working conditions of the engine and so forth, and the trip is started, we are required to periodically check our engines during our working period. We are required to look out for track obstructions, such as derails, and other obstructions. Working industries we are required to watch road crossings, picking up boxcars and so forth. We are to observe and see if there are obstructions—to see that there are no obstructions, no gang boards, no people working in or around boxcars, hook up to empty or any tank cars. We are to make sure there are no hoses connected such as to a chlorine tanks and so forth. If we hook up to something like that and moved it and busted a hose, there would be escaping fumes and so forth.

We always observe traffic, pedestrians. We make sure no cars are parked on the streets which are close to engines or boxcars on our side. I think I could
114 briefly describe our duties that way.

Q. Mr. Blackwelder, in your opinion what is the essential difference between yard firemen and road firemen's work? A. A yardman's work is mainly connected just within the yard limits, working industry and working in tracks in the yard where the traffic is more congested than what it would be on the road.

Q. You mean railroad traffic? A. Well, you would have switch engines and trains which would be coming back and forth and we would have to look out for all of those.

Q. Is there also more traffic other than train traffic? A. Other switch engines would be working around where you were too.

Q. Other than railroad traffic? A. Yes, there would be numerous trucks and so from around industries, men working that way. When you are working industries, also there would be dollys or loading cars and so forth.

Q. Mr. Blackwelder, in the period since June 28, 1963, of the men employed prior to that date, would they still be performing those services?

115 Mr. Zorn: Are you referring to the Richmond Yard, or will you identify the area of your question?

Mr. Kramer: Where he works.

The Witness: That is correct. They would still be performing the same duties.

By Mr. Kramer:

Q. Have you been told not to perform those duties any more? A. I have? I have not.

Q. Are the switching locomotives that are used today substantially the same as switching locomotives used in 1959? A. That is correct.

Q. Do the same malfunctions occur? A. Yes, they do.

Q. Are the same adjustments made? A. Yes, they are.

Mr. Kramer: No further questions.

Mr. Zorn: Your Honor, first I would like to make the same motion with respect to striking this witness' testimony which I have heretofore made, on the same grounds.

The Court: The motion will be denied.

Mr. Zorn: Do you have government's, pardon me, defendant's exhibit "a"? Defendant's exhibit number one. I am sorry.

116 (The exhibit was handed to counsel.)

Cross Examination

By Mr. Zorn:

Q. Mr. Blackwelder, there has been introduced in evidence in this proceeding a copy as defendant's exhibit number one, a document entitled, and I quote, "effective this date the following changes and deletions are made

in the book of Southern Railroad or Railway System Operating Rules effective August first, 1956."

I would like to ask you whether you ever saw on a bulletin board of the company those operating rules dealing with firemen which were posted on or about July first, 1963? A. Yes, I have.

Q. You have. Did you say you were the Local Chairman?

A. That is correct.

Q. As Local Chairman I assume you would have some interest in what the Company did in changing these operating rules; is that correct? A. That would be correct.

Q. Did you read these rules? A. Yes, I did.

117 Q. Contained in defendant's exhibit number one?

A. I did.

Q. Now in reading those rules, Mr. Blackwelder, those rules eliminate, do they not, a lot of duties, practically all duties, which firemen had been required to perform under earlier operating rules; is that not correct? A. According to the bulletin the rules said that they have, as you say, eliminated them. But we have never been instructed by these rules not to perform any duties that we ever performed.

Q. Now Mr. Blackwelder, you have been on the railroad for some time. You have been a Local Chairman for some time. And in terms of duties you are required to perform and in terms of grievance cases, is it not the fact that what is contained in operating rules is very important and given great weight by both employees and by the company? A. In discipline cases that would depend on what the man is charged with.

Q. But these new rules or amended rules, defendant exhibit one, eliminated, so that we understand each other, eliminated a lot of requirements with respect to duties of various kinds of firemen which had been contained in

118 prior operating rules; is that correct? A. According to the bulletin it would seem so. But we have not been instructed not to perform the duties.

Q. Would you just answer my question?

Mr. Blackwelder, I am asking only about what you read in the rules. Am I not right in saying since you have read them, that the new rules eliminated the requirement for practically all duties of all firemen, both new and old? I am talking now only about the rules. A. I do not believe so.

Q. Can you point out to me any provisions in defendant's exhibit one—and so long as we go into it, I will get the old rules—

The Court: We will take a few minutes at this time.

(Whereupon, there was a short recess, following which the proceedings were resumed as follows:)

119 Mr. Zorn: Your Honor, I was going to go into another line of examination but I think we can arrive at a stipulation and save time without further cross-examination. Would you indulge me?

The Court: Certainly.

(Counsel for both sides conferred jointly at the trial table.)

Mr. Zorn: If the Court please, we have arrived at a stipulation which I think will save considerable cross-examination time, and I would like my associate Mr. Saul Kramer to read the stipulation into the record.

The Court: All right.

Mr. Saul Kramer: It is stipulated and agreed subject to Plaintiff's objection on relevance and materiality that the following provisions of the Constitution of the Brotherhood of Locomotive Firemen and Enginemen which are currently in effect and which are required by said constitution to be followed by all local (subordinate) lodges:

The first provision is Section 28(a), page 89 of the Constitution:

"The president shall appoint a field or membership committee, who shall report at each meeting of the lodge the

names of all new men employed under the jurisdiction of the lodge and if members of the organization, to what lodges they belong."

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Section 28(b), on the same page of the constitution:

"When the names of any men so employed are reported to the lodge, there shall be a committee of three appointed, whose duty it shall be to investigate into the qualifications of the prospective candidates, and file a report in writing, giving the names and addresses of the candidates, with their recommendations, within thirty (30) days after their appointment. Should they fail to do so within the prescribed time, they shall be considered discharged and another committee shall be appointed who shall have the same time to make a report."

The next provision is Section 30(a), and that is found on page 90 in Article 8, and reads as follows:

"An applicant for membership must be actually employed as a locomotive fireman (helper), engineman, engine hostler, hostler helper, engine dispatcher, employed handling engines in or about roundhouse or ash pit, in shop yards, locomotive works or industrial plants, motorman or helper on electric engines, motor or gas cars on roads where electric energy is used or has been substituted for steam, or holding seniority rights as such, at the time he makes his application; provided he shall not be a member of any other labor organization assuming to represent engineers, firemen (helpers), hostlers or hostler helpers, except the Brotherhood of Locomotive Engineers, nor shall he be a member of any organization of employees which at any time, in any manner, endeavors to interfere with the policy or action of this Brotherhood. Engine hostlers or engine dispatchers are persons who actually handle and are responsible for the care of locomotives. Foremen who act as hostlers and receive hostlers' pay shall be eligible to membership. Hostler helpers are persons who

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are assigned and required to assist hostlers. Traveling engineers, traveling firemen and motormen employed on street railways are not eligible to membership."

We have also stipulated to read into the record at a later date, probably tomorrow, Section 30(b) of Article 8, which is found on page 91.

We have also stipulated to read into the record Section 32(a) of Article 8 found at page 93, and Section 32(b), and the first sentence of Section 32(c).

Section 32(a) reads as follows:

"Applicants shall be balloted for according to the laws of the organization."

122 Section 32(b) reads:

"If not more than two blackballs appear, the applicant shall be declared elected."

Section 32(c), first sentence, reads:

"If three (3) or more blackballs are cast, he shall be declared rejected and the application fee paid by him shall be returned"

We have also stipulated to read into the record Section 32(d) on page 94, Article 8:

"A lodge may take a blanket ballot on applicants for membership."

The last provision is Section 47 on page 121, of Article 8—Section 47(f):

"A member holding membership in a lodge not having jurisdiction over the seniority district on which he is employed, shall be transferred through compulsory transfer to the lodge having jurisdiction; provided, this shall not apply to a member who, since prior to January 1, 1917, has held continuous membership in a lodge on the system but not representing the seniority district on which he is employed."

That is the last provision, your Honor.

The Court: All right.

123 Mr. Zorn: Your Honor, in view of that stipulation
I have no further questions of this witness.

The Court: All right.

Mr. Milton Kramer: No redirect, your Honor.

The Court: All right.

You may step down.

(The witness left the stand.)

Thereupon

James E. Smith.

called as a witness on behalf of the Plaintiff, and being
first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kramer:

Q. State your full name and address, please. A. James
E. Smith, 3 Russell Road, Alexandria, Virginia.

Q. What is your occupation? A. Locomotive Fireman
and Engineman, Washington Division, Southern Railway.

Q. How long have you been so employed? A. Since 1941.

Q. Who employed you? A. A Southern Railway official.

Q. What official? A. Master Mechanic, Washington
Division.

124 Q. Did the master mechanic at the time you went
there tell you that there was an educational require-
ment for employment by the Southern? A. It required a
high school education.

Q. Is that what he told you? A. Yes, sir.

Q. Were you given a book of operating rules? A. I was.

Q. Were you examined on its contents? A. I was.

Q. And have you been examined on its contents since
then? A. Each year I have been on the Southern I attended
a train rule class, and have been interviewed on the train
rules, except in the years I was in the Service.

Q. What were those years? A. Approximately three years.

Q. When? A. During the second World War.

Q. When were you promoted from fireman to engineer? A. 1951.

Q. Is your seniority as a fireman and engineer on the road seniority roster or yard seniority roster? A. Road.

125 Q. Will you briefly describe the services that are or were performed by a fireman in 1959?

Mr. Zorn: Just that the record may be clear, your Honor, may I have my objection to this entire line of testimony? The Court: You may.

Mr. Zorn: And the further objection, of course, that this is getting cumulative and totally unnecessary.

Mr. Kramer: Unquestionably it is getting cumulative but Mr. Zorn brought out on certain questions that were asked, that the man's knowledge pertained only to a certain place. For example, I will go into it with this man as I did with others, into this subject of what services they performed then and now, and whether the old employees are still doing it.

Now, he will say they are still doing it somewhere else, and I have about thirty witnesses who will say they are still doing it all over, with different places, in the Southern.

If they will agree he will so testify, we need not have this witness.

This witness can testify only about the Washington Division, which runs from Alexandria—to where?

The Witness: Washington, D. C. to Monroe, Virginia.

Mr. Kramer: If Mr. Zorn is going to insist they can testify only with respect to the place they work, I
126 just have to keep asking all these men about different places; but the testimony is all the same.

The Court: Of course, it appears to the Court that it is cumulative.

Mr. Kramer: Well, yes. If his testimony on what happened in road service between Washington and Monroe is cumulative, but what Mr. Blackwelder says happened in Richmond, then it would be subject to that objection, but I am not sure it is cumulative in that respect.

The Court: All right.

Mr. Kramer: If Mr. Zorn is willing to stipulate that all these people from all various part of the railroad will give the same testimony, we don't need it.

Mr. Zorn: I would prefer of course, subject to all my objections and also subject to the cumulative nature, to stipulate. I would be prepared to stipulate that the testimony with respect to duties heretofore performed by firemen, of these subsequent witnesses would be substantially the same as that of Mr. McCollum.

I would not be prepared to stipulate that all of the older men are required in any way whatsoever to perform those duties or that all of the older men are doing them simply because the operating rules have been changed so as not to require it; nor do I know of any witness here who
 127 can testify that he knows that every single one of every single older fireman on the Southern railroad would do it.

The first part of the stipulation I would go along with.

Mr. Kramer: Would you stipulate that all the people who would be called would so testify?

Mr. Zorn: All of the older people, every fireman on the railroad? Obviously not.

Mr. Kramer: Not every fireman on the railroad; every fireman that they have seen.

Mr. Zorn: I would stipulate that some are doing it.

Mr. Kramer: I am asking—

Mr. Zorn: I don't know, quite frankly, if we go down the entire roster of every fireman on Southern, after a rule is changed in which he is emphatically instructed by the rules that he is no longer required to do these things, how for the life of me, unless we parade in here every

fireman, I can enter into a stipulation which would give your Honor the impression that they were all doing it when they are no longer required to do it.

Mr. Kramer: I have not suggested any stipulation that these men are required to do it. None of these witnesses has so testified. All that they have testified to is that the
 128 older men are still doing it and that they have not been told not to do it.

That is all that they said in that respect.

Mr. Zorn: And no matter how much testimony you put on it seems to me that you will be unable to establish the latter point that all the older men are still doing it and have been told not to do it. The operating rules have told them not to do it.

Mr. Kramer: No, what the operating rules say speaks for itself.

The Court: Wait just a moment.

Mr. Kramer, the Court is of the opinion that the controlling factor is what the requirement of the office is; not what they actually do. It is what they are required to do. In other words, what could they be discharged for not doing.

Mr. Kramer: Well, if that is the test, then this would be cumulative, of course.

The Court: Yes.

Mr. Kramer: There is one witness I would like to call anyway.

Is it understood also that if the rest of the witnesses were called, they would so testify so far as they know?

Obviously, I could not cover every fireman on the
 129 Southern Railroad, but if they were called that they would testify to the same effect as Mr. Blackwelder, and I don't know whether this gentleman testified to it or not, but some of the others —Mr. Gambrell—that so far as they know, and there, of course, their knowledge does not cover every last one of the 12-hundred or so firemen, that they would so testify?

Mr. Zorn: To save time, and subject of course to all of our objections, as I indicated, your Honor, although it is completely cumulative, I would have no objection that other witnesses would testify substantially similarly to the witnesses already called with respect to duties which in the past had been performed by firemen.

The Court: Duties in the past that what?

Mr. Zorn: Were required of and performed by firemen.

I am in no position to stipulate, nor do I think it is in the slightest degree relevant, nor do I think that any witness produced by the other side can possibly testify, that despite the change in rules eliminating any requirement for firemen to perform duties, that one, twenty, thirty, fifty or a thousand firemen are continuing to perform duties; because, as you have properly put it just a moment ago, they cannot be discharged. The rules no longer require them to do it,

and there is no need that they be told that they don't
130 have to do it. New men have to be told what they are to do or not to do, but older men familiar with the operating rules and having attended the classes that have been described here, know perfectly well that they are no longer required to do anything and they cannot be disciplined in any way for failing to do it.

I think those are the facts, your Honor. I do not think we need a great deal of testimony on that.

Mr. Kramer: I do not disagree with those being the facts, but I do want to show that they are doing it and have not been told not to.

The Court: Well, that may be, but the Court is concerned with what the rule is.

Mr. Kramer: Very well.

The Court: And I am sure that you agree, do you not, that many employees I suppose perform many duties, that is how they get promoted, because they do good work, but we are talking about the requirements, aren't we?

Mr. Kramer: I thought not. I thought we were talking about the work that was actually done in 1959.

The Court: Well, Mr. Kramer, we would go so far afield, would we not, because certainly not all firemen do identically the same thing. We are concerned with what
132 the requirements were; because Mr. McCollum was the one, wasn't he, that testified this morning that he acted on many grievance committees? Now, the grievance would have to arise through some alleged violation of a rule or of a duty to perform, wouldn't it?

Mr. Kramer: Yes indeed.

The Court: And not from any "extra."

So that we are concerned with the rules that control. Otherwise, you would have to take every fireman on the railroad.

Mr. Kramer: This gets down to a very important issue in this case, that is, what did the order require them to do? I mean, your order required them to use firemen as they used them before. Now, can they just abolish all their rules and say "Well, there are no duties left on the fireman; we will have a brakeman do it, an engineer do it, or someone else do it."

The Court: That brings up an entirely new question.

Mr. Zorn: Exactly.

The Court: We will get to that question.

Mr. Kramer: Very well.

The Court: But my understanding is that Mr. Zorn has stipulated that if called, all of the witnesses that
133 you have present would testify that their duties are somewhat analogous to what Mr. Blackwelder, Mr. Gambrell and Mr. McCollum testified to.

Mr. Zorn: As performed prior to July 1st, 1963.

The Court: That is right.

Mr. Kramer: And they would also testify as they did, that they are performed today by the older men. That has already been testified to.

The Court: All right.

Mr. Zorn: Well, I won't stipulate to that.

The Court: That is right. The Court understands that you won't stipulate to that, Mr. Zorn.

Mr. Zorn: As part of that stipulation can we also have a stipulation that copies of Defendant's Exhibit 1, which is the modification of the operating rules with respect to firemen, was posted on all bulletin boards on all divisions of the Southern Railway system?

Mr. Kramer: With this one qualification, which I am sure you will agree to, that is, all bulletin boards which firemen and engineers were required to look at. There were other bulletin boards that other crafts look at.

Mr. Zorn: Well, yes. There is no doubt that they all knew about it.

The Court: All right.

134 By Mr. Kramer:

Q. Mr. Smith, are you familiar with the services that firemen performed on Diesel locomotives in 1959? A. I am.

Q. Are those services still performed by firemen today, that is, those firemen who were employed prior to June of this year?

Mr. Zorn: That is objected to on the ground that in order to establish it was done by firemen, a foundation must be laid that this witness knows from his own personal knowledge, your Honor, with respect to every fireman on his division and elsewhere as to exactly what work that man is doing each day that he is on a run.

Mr. Kramer: Literally that is correct, and I will change the question.

The Court: All right.

By Mr. Kramer:

Q. Mr. Smith, have you worked both as fireman and engineer? A. I have.

Q. And have you worked in both capacities? A. I have.

135 Q. Since 1955? A. I have.

Q. And when you served as an engineer did you

observe the performance of the services of the fireman? A. I have.

Q. Now, when you acted as fireman, and when you observed other firemen acting as firemen, are they performing or have they since June of this year performed the same services as they performed in 1959 if they were employed prior to June 1963? A. All the firemen that have been employed previous to these new firemen continued to do their job as locomotive firemen as they have done in the past.

Q. Have you served as engineer with any new firemen? A. I have.

Q. About how many? A. Approximately six or eight.

Q. When you were so serving as engineer with these new firemen did you perform any services that formerly were performed by firemen? A. Well, I have and so has road foremen riding on the engine with us.

Mr. Zorn: Excuse me. I did not hear that.

A. What was the question again?

(Pending question, above, read by the Reporter.)

136 A. I did, and also the road foreman on one occasion.

By Mr. Kramer:

Q. What functions have you performed as engineer that formerly were performed by firemen when you had one of the new men? A. On one occasion, on Train 155, it was necessary to stop and start the engines, and try to correct other malfunctions that I was unable to do, meaning when we stopped the engine would not unload. Then at the end of each trip it was necessary for me to shut down and put on the handbrakes and secure the engines at the end of the terminals.

On other occasions it was necessary for me to start the engines and do the necessary work that previously had been performed by the firemen, such as checking the fuel and sand, lube oil, and all other previous jobs that the fireman had.

Q. Where was that? Was that a main track or side track? A. No, that was in Alexandria, and at Harrisonburg, Virginia.

Mr. Kramer: Will Mr. Zorn stipulate that each of the witnesses will give the same testimony about the locomotives being about the same, the trains being along the same malfunctions occurring and the same adjustments made as formerly, and skip all of that?

137 Mr. Zorn: Subject to all my objections, yes.

Mr. Kramer: Subject just to relevancy, of course. That is all on direct, your Honor.

The Court: All right.

Mr. Zorn: I just have a few questions, Mr. Smith.

Cross-Examination

By Mr. Zorn:

Q. How many firemen are there actively working—I am talking now of the older firemen, not the new ones—actually working on your division which I think is the Washington Division, is that right? A. That is right.

Q. —since June 28 of this year? A. It is approximately six new firemen.

How many others are there? A. I don't know the exact number.

Q. Would it be fifty? A. Probably.

Mr. Zorn: I don't have the exact figure either, but you are in a better position to indicate than I am.

Q. You say there are fifty or there may be more? A. There may be.

138 Q. There may be more than that, and we can get the exact figure some other time.

Now, since June 28 have you personally ridden with every single fireman—I am talking now of the older firemen—on every run which each of these older firemen has made on the Washington Division between June 28 and today? A. I have not.

Q. You have not? A. No.

Q. How many runs have you been on between June 28 and today, acting as an engineer, where you had an older fireman with you? A. The majority of the time.

Q. The majority of the time. You were on every day, four time a week? A. Practically every day.

Q. Do you have the same or other firemen? A. I am on the engineer "extra" list, working different jobs; naturally, most of the time I have different firemen.

Q. All told, of the fifty or more older firemen on the Washington Division, with whom you have ridden since say July 1st, really, 1963, how many such older firemen have you actually been on trips with since July 1st—how many different men? A. Well, that is a little hard for me to say, but a majority of the time it is a different man.

Q. Well, you haven't ridden with fifty, have you? A. I couldn't say that I have ridden with all fifty firemen, all the firemen on the Washington Division.

Q. And certainly with respect to those firemen you have not ridden with, you personally don't know what they did? You personally don't know this? A. That is right.

Q. You don't know what they did. As a matter of fact, Mr. Smith, so far as the older firemen are concerned, the Brotherhood has taken a position, has it not, which it has let its members know, that they should continue to do this work regardless of the change of the rules; isn't that so? A. No, the Brotherhood has not let them know anything concerning continuation of our duties.

Q. You haven't through the Brotherhood told these older firemen that despite the change in the operating rules, eliminating any requirements that they do any of this work, that they should continue to do it anyhow? A. No.

Q. You haven't done that personally? A. No.

Q. You don't know whether any other local chairman has or has not done it, is that correct? A. I am only familiar with the Washington Division.

Q. You are familiar only with the Washington Division, is that right? A. That is right.

Mr. Zorn: Thank you. No further questions.

Mr. Kramer: That is all.

The Court: Mr. Smith, as long as you are on the stand, I will ask you this:

You run from Washington to where?

The Witness: Your Honor, on passenger runs our division is Washington, D. C. to Monroe, Virginia.

Our freight service is from Potomac Yards to Monroe, Virginia, and including branch lines.

The Court: You are an engineer?

The Witness: Yes, sir, at the present time.

The Court: And you are on the "extra" list?

The Witness: Yes sir, at the present time.

The Court: When a fireman is with you, it may be a different fireman every run?

The Witness: Yes, sir, that is possible.

The Court: Does he ever operate the engine?

The Witness: Yes, sir. Most of these firemen are
141 promoted men and at times they relieve me and I
take over the firemen's duties.

The Court: But that would be the only time?

The Witness: I don't—

The Court: In other words, if a fireman had not qualified
as an engineer he would not operate the engine?

The Witness: No, sir.

The Court: All right.

You may step down.

(The witness left the stand.)

Thereupon

J. W. Stivers.

called as a witness on behalf of the Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kramer:

Q. State your name. A. J. W. Stivers.

Q. Where do you live? A. 814 Kenridge Avenue, Ludlow, Kentucky.

Q. Where are you employed? A. Southern Railway, Cincinnati, Ohio.

142 Q. In what capacity are you employed? A. Engineer and fireman.

Q. Where? A. Cincinnati, Ohio.

Q. How long have you been so employed? A. 1946.

Q. What official of the Railroad employed you? A. Trainmaster Griffith from Danville, Kentucky.

Q. When he employed you, did he tell you that there was an educational requirement for employment as a fireman? A. Yes, he did.

Q. What did he say it was? A. High school education.

Q. Did he give you a book of operating rules? A. Yes, sir.

Q. And an examination on it? A. Yes, sir.

Q. And have you been given an examination on it since? A. Pardon?

Q. Have you been given examinations on the book of operating rules since then? A. Yes, every year.

Q. Are you a yard or a road fireman and engine-
143 man? A. Sorry?

Q. Are you a yard or road service man? A. I am in the yard service.

Q. Are you familiar with the services performed by firemen in 1959 in yard service? A. Yes, sir.

Q. Have you worked as a fireman since June 28 of this year? A. Yes, sir.

Q. When you worked as a fireman since June 28 of this year did you continue to perform those services? A. Yes, I did.

Q. Did you work as an engineer since June 28, 1963? A. Yes, sir.

Q. When so working did you observe what your fireman did? A. Yes, sir.

Q. Did he continue? A. Yes sir.

Q. When your fireman was one of the employees employed prior to June of this year did he continue to perform those services? A. Would you repeat that, please?

144 Q. When working as engineer, since June 28 of this year, have you had firemen who were employed prior to June of this year? A. Yes, sir.

Q. On those occasions did they perform the services that firemen performed in 1959? A. Yes they did.

Q. Have you been told not to perform the services of a fireman? A. No, sir.

Q. Have you discussed with an official of the Southern Railway whether you should continue to perform those services? A. Yes, sir, I had a conference. Yes, sir, I did have.

Q. With whom? A. With the Superintendent of the Terminal at Cincinnati, Ohio.

Q. What did he tell you?

Mr. Zorn: Who is he, and when?

By Mr. Kramer:

Q. What is his name? A. His name is Sharp.

Q. What did he tell you? A. I had a conference with

145 Mr. Sharp and I asked him about these new rules he had in effect and should we abide by them. He said that he couldn't tell us not to do the work we had performed before, but, if he were a fireman, he would continue to do so.

Mr. Kramer: No further questions.

Mr. Zorn: Same motion to strike, your Honor, and I anticipate the same ruling.

The Court: Same ruling.

Mr. Zorn: I have no questions of this witness, your Honor.

The Court: All right.

You may step down.

(The witness left the stand.)

Thereupon

J. P. Fitzpatrick.

called as a witness on behalf of the Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kramer:

Q. State your name. A. J. P. Fitzpatrick.

Q. Where do you live? A. I live in Atlanta, Georgia; 154 Rocky Ford Road, Northeast.

146 Q. Where are you employed? A. Employed in Atlanta, South end of the Charlotte Division, between Atlanta and Greenville.

Q. Employed by whom? A. Southern Railway.

Q. Are you in yard or road service? A. Road service.

Q. What work do you do? A. At the present time I am an engineer.

Q. Prior to that were you a fireman? A. I was a regular fireman on all classes of service from the time I was hired in 1941 up until about '61.

Q. Has there been any gap in your employment with the Southern since 1941? A. Yes, sir. I was in the Service from 1944 to 1946.

Q. Who employed you in 1941? A. Mr. J. M. Parker.

Q. Who was he? A. Trainmaster, Greenville, South Carolina.

Q. Did he tell you there was any educational qualifica-

tions for employment? A. Yes, he asked if I had a high school education.

Q. Did he give you the book of operating rules to
147 study? A. He did.

Q. And examination? A. Right.

Q. Have you had examinations on it since then? A. Yes. We have annual review.

Q. Are you familiar with the services that road firemen performed in 1959? A. Yes, I am.

Q. Have you worked as a fireman since June of this year? A. No, sir.

Q. Have you observed what firemen did when you were running as engineer since June of this year? A. Yes, I have.

Q. On those occasions when you had one of the firemen whose first employment was prior to June of this year did he continue to perform the services that were performed in 1959? A. He certainly did.

Q. Are you an official of the Brotherhood? A. I am a local chairman on the South end of the Charlotte Division.

Q. Do you know whether Southern since June of this
148 year has run any passenger trains with one of their new firemen? A. Yes, sir, there has been twelve passenger trains run on my division alone.

Q. Since June 28 of this year? A. Yes, sir.

Q. With one of the men employed since June of this year?

Mr. Zorn: Just a moment.

Unless this witness has direct, personal knowledge from personal observation.

The Court: Yes. That is what you are asking, is it, Mr. Kramer?

Mr. Kramer: No, I am asking him whether he knows. If you want to know how he knows, I will ask him that.

The Court: All right.

Mr. Zorn: Well, I object to the question unless there is a foundation laid—We are in a contempt situation, your Honor, and hearsay should completely be excluded here—

whether this man of his personal knowledge and observation knows what he is testifying to now.

That foundation must be laid before the testimony is admissible.

Mr. Kramer: Well, it was all in before you objected anyway.

149 Mr. Zorn: I move to strike on that ground.

The Court: Very well.

By Mr. Kramer:

Q. Mr. Fitzpatrick, do you know whether passenger trains have been run since June 28 without a fireman?

Just answer me whether, now. A. Repeat your question.

Q. Do you know whether the Southern has operated passenger trains on your division with one of these new firemen since June 28, 1963? A. Yes, sir.

Q. How do you know? A. Well, I secured my information from the worksheets at the call office where they called the crews from Atlanta, Georgia, and I also personally saw one on Train Number 33 one day.

Q. Now, apart from Train 33 did you—

Mr. Zorn: Just a moment.

I think it is clear, your Honor, that this witness cannot have personal knowledge except with respect to one case where he testified he saw one on one train.

Other than that, he is relying on second-hand information. In a matter of this kind, I think that this
150 testimony is clearly incompetent.

Mr. Kramer: He is relying on the records of the Southern.

The Court: Of the Southern?

Mr. Zorn: Of the Southern?

Mr. Kramer: Yes.

Mr. Zorn: Are those records here?

Mr. Kramer: They are not.

Mr. Zorn: On a matter of this kind, your Honor, I would submit that this witness should not be permitted to

testify to a matter based upon his recollection of what he saw in certain records without having the records here so he can be effectively cross-exaimned. The matter is too serious.

The Court: Even though they are your records?

Mr. Zorn: Let's identify the records. I do not think they have actually been identified yet.

The Court: All right.

Mr. Zorn: If there are records, I think we should defer his testimony until we get the records here.

By Mr. Kramer:

Q. Describe the records in more detail. What are they?

A. The call office in Atlanta, Georgia, keeps a daily report of the crews called for the various trains, and this is 151 where I got my information on the twelve runs that were operated with these newly hired employees.

Mr. Zorn: May I ask him a preliminary question?

Mr. Kramer: Go ahead.

By Mr. Zorn:

Q. What kind of a document did you look at? A. It is the regular what-they-call a "call sheet," sir.

Q. Call sheet? A. Yes, that the call office, the man who is on duty—

Q. Well, the call sheet would indicate what? A. It would indicate the five crew members that went out on each train that was called that day.

Q. And would have the names of the men of that crew on it? A. That is right, sir.

Q. But apart from what you saw on the call sheet, except in the specific case that you say you saw one, you were never on the other trains and you never saw the men; is that correct? A. That is correct.

Mr. Zorn: Same objection, your Honor.

The Court: All right. The objection will be over- 152 ruled.

By Mr. Kramer:

Q Have you testified how many such trains were run with one of these new firemen? A Yes, sir. Twelve, sir.

Mr. Kramer: No further questions.

Cross-Examination

By Mr. Zorn:

Q. Since your testimony has been permitted with respect to what you saw on the call sheets, would you tell us what particular trains they were and on what particular dates?

A. I could get that for you, sir. I know the trains.

The first one, if I am not mistaken, and I would have to recollect on my memory on that, was Number 30 out of Atlanta, and to be sure today I would have to get my records to see.

Q. And the records would also show whether there was a road foreman on any of those trains, would they not? A. No, sir, they would not.

Q. The records would not show that? A. No, sir.

Q. And so you would be in no position to know, 153 then, whether with respect to at least five of the cases that you say happened, there was or was not a road foreman present on that locomotive; is that correct? A. That is correct.

Mr. Zorn: Thank you.

Mr. Kramer: No redirect, your Honor.

The Court: All right.

You may step down.

(The witness left the stand.)

Mr. Kramer: Your Honor, all the additional testimony we would offer through witnesses would be cumulative.

The Court: All right.

Mr. Kramer: At least, in the sense that your Honor understands it to be cumulative, as you indicated before—all of it.

The Court: All right.

Mr. Kramer: So I assume you are sustaining an objection to more of the same?

The Court: Yes.

Mr. Kramer: We have no further witnesses.

The Court: All right.

Mr. Zorn: If the Court please, without any—

Mr. Kramer: Except on rebuttal, perhaps, your Honor.

154 Mr. Zorn: There may not be any.

If the Court please, without any further argument—because I think we have made our position completely clear to you—I should like at this time to move to dismiss both the civil and the criminal contempt motions here before you on the Plaintiff's case, on the grounds which I have formerly argued before you very fully. So that if our position is sound—and I would seriously like you to reflect, if you would, on it, your Honor; because otherwise I don't know at this moment the extent to which we may be required to bring in proof to meet a great deal of testimony presented here if in the final analysis it turns out that all of these things are totally irrelevant and inadmissible and improper within the scope of this proceeding.

We have a heavy burden, and we are prepared to meet that burden and put in all the evidence that is required to meet any of the charges made here with respect to the compliance with your order, but in view of the nature of the testimony that has been put in, I would plead with you to make a ruling on a matter which I think is crystal clear, and we are prepared to submit the question of contempt, or compliance with respect to trains and people hired, on the stipulation.

As to the other matter of need or use of firemen or
155 anything else we say to you, again, that that cannot conceivably form a basis for a contempt under the order issued by you.

The Court: Your motion, of course, goes to the hiring of 225 new firemen, and not to the specific allegations.

Mr. Zorn: My motion, to state it another way, your Honor—my motion goes to the fact that—

The Court: In other words, so that it is crystal clear to you, the Brotherhood rely on the stipulation on the 47 specific instances.

Mr. Zorn: Yes, your Honor.

The Court: Now, your motion does not embrace that violation?

Mr. Zorn: On that basis, your Honor, we would be prepared to submit that issue to you, even without further proof unless you feel proof is required, because I think the stipulation points out the number of men who are hired, the total number of runs, the very isolated instances where your order was not complied with, and the stipulation reflects, I think, diligent and good faith effort, and unless you would feel that you needed testimony on that particular issue we would be prepared to rely on that particular aspect of the case on the stipulation itself.

The Court: So that your motion does go to both?

156 Mr. Zorn: Yes, sir.

The Court: All right.

Mr. Kramer: Are we having argument on that now?

The Court: I do not think so, gentlemen. We will take it up at 10:00 o'clock tomorrow morning.

The Court will give it some thought overnight and will hear from counsel tomorrow morning.

Now, you gentlemen can come up here, if you will, on a procedural question only.

(At The Bench:)

The Court: I presume you want to get these people out of town?

Mr. Kramer: I would certainly like to at least tomorrow.

I could let some of them go, but I certainly should keep some for rebuttal.

We can keep a half dozen, I suppose. I have 30 people here, or at least 28.

If I kept a half dozen that would be enough, I think, your Honor.

The Court: Well, it would appear to the Court that practically all of the factual issues are conceded on both sides.

157 Mr. Zorn: Except this, your Honor: You take the last witness who testified to the conference he had with his superintendent; I have to call that man with respect to whether or not what he said to him about continuing.

You see, Mr. Kramer keeps making the point that these fellows were not told, the older fellows were not told by some individual or official not to do something, despite the fact that the new operating rules were plastered all over the system.

On that kind of testimony I don't know where I stand. I may have to call every local superintendent and every division officer to have him testify as to what instructions he did or did not give in addition to or apart from the posting of the operating rules. That is the position I am put in here if this stuff is relevant, but which I don't think it is.

The Court: But Mr. Kramer will agree that the operating rules are the controlling factor.

Mr. Kramer: I will agree the operating rules have changed.

The Court: And that they are the controlling factor?

Mr. Kramer: They are not. I do not agree to that.

The Court: You do not?

158 Mr. Kramer: No. I think they are virtually irrelevant in determining your order.

The Court: I am talking about the running of the railroad by the management, the operating rules control.

Mr. Kramer: The operating rules control the requirements.

The Court: Yes.

Mr. Kramer: Oh yes.

The Court: It is not up to the employee to tell them how to run the railroad.

Mr. Kramer: Not unless they bargained about it.

The Court: So it is conceded in this particular case that these rules that were promulgated—when?

Mr. Zorn: Effective July 1st, 1963, your Honor.

The Court: —were put on the board?

Mr. Kramer: I certainly concede that.

The Court: Now, whether Mr. Smith or Mr. Gambrell—because they are engineer-firemen, aren't they?

Mr. Kramer: Yes, they qualify as both, your Honor.

The Court: Yes. Now, whether they kept on performing the duties that they had been performing for 20 years is of little consequence to the Court, as I see it. The question gets down to what is the employee required to do; not what he did do.

Mr. Kramer: I am sorry you think that is the question. I think that is irrelevant.

Mr. Day: The question is whether or not the carrier has complied with the order.

Mr. Kramer: With the order, yes.

The Court: But that is a legal argument.

Mr. Kramer: Surely.

The Court: That has nothing to do with factual issues.

Mr. Kramer: No.

Mr. Day: This is all behind, or subsequent, your Honor.

Mr. Kramer: That is right.

The Court: That is why I say you have 30 people here and is there any need to have those 30 people remain?

Mr. Zorn: On their side, your Honor?

The Court: Yes.

Mr. Zorn: I have only one problem, your Honor, the way the case has developed here: I don't know at this moment how many witnesses I can put on and in what areas I will put them on. I have to think that out because

all this testimony has been admitted. I am up against a contempt situation.

160 Mr. Kramer: Do you want to do anything other than challenge the accuracy of what they said?

Mr. Zorn: I may do a lot of other things.

I am not prepared now, in view of the nature of this testimony, to make any commitment. I have a serious problem.

Had you listened to me and not put this testimony on, we would have had no problem.

The Court: Of course, if we hadn't brought the action nobody would have a problem. (Laughter)

So we will think it over until 10:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 4:00 o'clock p. m., an adjournment was taken until tomorrow, Friday, September 13, 1963, at 10:00 o'clock a.m.)

163

PROCEEDINGS

The Deputy Clerk: Brotherhood of Locomotive Firemen and Enginemen versus Southern Railway Company, et al., Civil No. 2881-62.

The Court: All right, gentlemen. Mr. Kramer, and Mr. Zorn. What is the procedure this morning?

Mr. Kramer: I don't know. We weren't clear last night whether you had said at the close of the session yesterday that you would hear argument on Mr. Zorn's motion or not this morning.

The Court: Certainly, I will hear argument if you want to present it.

Mr. Kramer: If Mr. Zorn makes an argument I would like to oppose it, of course.

Mr. Zorn: Well, your Honor, we are of course prepared to go forward with our case. If you feel that that is the proper procedure, we won't press any harder with respect to our motion at this time, if that is your preference.

The Court: Now, you rest?

Mr. Kramer: Yes.

The Court: And for the record you make the motion.

Mr. Zorn: The motion is on the record.

The Court: And that will be denied. So you can
164 proceed.

Mr. Zorn: Thank you.

166

J. H. Porter

167 was called as a witness for and on behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavinsky:

Q. What is your full name? A. J. H. Porter.

Q. Where do you live, Mr. Porter? A. I live in Bessemer, Alabama.

Q. How old are you, sir? A. Well, I am sixty-four.

Q. Were you employed by the Southern in August of 1963? A. The first part of August. I can't tell you the correct date.

Q. Was it the beginning of August if you recall? A. Yes, it was.

Q. And for what position were you employed, sir? A. Fireman.

Q. Was that in the Birmingham Yards? A. That is right.

Q. Were you asked to join the Brotherhood of Locomotive Firemen & Enginemen?

168 Mr. Kramer: I object. I don't see that has any relevancy or materiality with this case, as to whether the Southern is operating in contempt of your order.

Mr. Lavinsky: Your Honor please, in effect Mr. Kramer is taking the position here that the men that we have hired are not firemen. We intend to show your Honor that not-

withstanding the Brotherhood's position in this Court, that they have considered these people sufficient firemen to have them become members of their Union or to solicit them for membership.

Your Honor heard the provisions of the constitution and the testimony of the witnesses in this regard.

The Court: The objection will be overruled. We will proceed.

By Mr. Lavinsky: Please read the last question.

(The reporter read the last pending question.)

The Witness: Yes, I was.

By Mr. Lavinsky:

Q. By who, sir? A. By the committeeman.

Q. Was it the Local Chairman? A. It were.

Q. When were you asked to join? A. The first
169 day I worked.

Q. Did you sign any papers at that time? A. I did.

Mr. Lavinsky: I would like to have this marked for identification as defendant's exhibit number two.

(Defendant's Exhibit No. 2 was marked for identification.)

By Mr. Lavinsky:

Q. Mr. Porter, I show you this document, defendant's 2 for identification, and ask you whether you signed that?
A. I did.

Mr. Lavinsky: I offer it in evidence.

The Court: Any objection, Mr. Kramer?

Mr. Kramer: The same ground as to the testimony. It is immaterial as to whether the Southern is in contempt, which is the issue.

The Court: The objection is overruled. It will be received in evidence.

(Defendant's Exhibit No. 2 was received in evidence.)

By Mr. Lavinsky:

Q. Did you also sign an application form, Mr. Porter?

A. I did.

170 Q. Were you thereafter advised that your application for membership had been received? A. I sure was.

Q. Were you so advised in writing? A. That is right.

The Court: Mr. Kramer, we will mark it 3-A and B.

Mr. Lavinsky: We will mark it "A" and "B" because there is an envelope attached to it.

The Court: Just a moment. For the record, they all pertain to the same witness and transaction. So it was 2, was it not?

Mr. Lavinsky: You want to see them all in the same number?

The Court: We will mark the first one 2-A, and this will be "B", and this will be 2-B and C.

Mr. Lavinsky: Defendant's 2-B and C for identification.

(Defendant's 2-B and C was marked for identification.)

By Mr. Lavinsky:

Q. I ask you, Mr. Porter, whether this is the letter you received from the Brotherhood advising you that your application for membership had been accepted? A. It is, yes, it sure is.

171 Mr. Lavinsky: I offer this letter in evidence, your Honor, and would you permit me to read this, or would you prefer to see it?

The Court: You can read it in the record.

Mr. Kramer: I object on the same grounds.

The Court: Overruled.

Mr. Lavinsky: This is a letter on the letterhead of Brotherhood of Locomotive Firemen and Enginemen, Cleveland 15, Ohio, addressed to Mr. J. H. Porter, 712 Avenue "F", Lipscomb, Alabama. It is dated April 9, 1963:

"Dear sir, and Brother:"—

Mr. Kramer: I didn't examine that carefully enough.
This is not a letter addressed to this witness.

Mr. Lavinsky: J. H. Porter is the name of the witness.

Mr. Kramer: I though you said Lipscomb.

Mr. Lavinsky: That is where he lives.

Mr. Kramer: I thought he said he lives in Bessemer.

The Court: I don't know. I know he read the "J. H. Porter."

Mr. Lavinsky: This is dated August 9th, if I said April 9th is the date of the letter.

"Dear Sir, and Brother:

"This will acknowledge your application for admission or re-admission to membership in the Brotherhood of Locomotive Firemen and Engine-men as a non-insured member.

"The application has been accepted and your name placed in the Grand Lodge records as a member of Lodge 426, effective August 9, 1963. You will be liable for assessments beginning with the month of September, and these should be paid on or before the first day of each month to the Financial Secretary of your Lodge, whose name and address is R. E. Sly, 808 Hillcrest Road, Birmingham 15, Alabama. You will earn a fortune between your first and last pay checks. Part of everything you earn should be yours to keep. The difficulty lies in saving it and keeping it saved. You can save on the installment plan to buy a definite sum of money for future delivery whenever you need it most. All that will be there when you get there is what you sent ahead. It will be to your everlasting benefit for you to investigate the provisions of our retirement income plan of insurance. Additional information on insurance may be obtained by contacting your local Lodge insurance representative, or you may write direct to me and every assistance possible will be rendered.

173 "Commending you upon joining the ranks of the
Brotherhood, I am with kindest and best regards,

"Yours fraternally,

"R. R. Bryant."

There is in addition a postscript.

"P.S. Please furnish your full given name for our records."

There is thereafter, your Honor, in the lower left-hand corner, stamped the following:

"Members sixty years of age or over are not entitled to participate in the beneficiary insurance department."

The Deputy Clerk: Defendant's 2-B and 2-C in evidence.

(Defendant's Exhibits Nos. 2-B and 2-C were received in evidence.)

By Mr. Lavinsky:

Q. Mr. Porter, what was your work before joining? A. U. S. Steel. Mine work.

And what did you do in your mine work? A. Well, I was a foreman, a hauling foreman.

Q. When did you leave that position?

Mr. Kramer: Do I have to keep on objecting to
174 all of this testimony? I want to object on the grounds this has nothing to do with whether the Southern is in contempt of your order.

The Court: You can have a running objection to all of the testimony of this witness.

Mr. Lavinsky: Read back the last question.

(The reporter read the last pending question.)

The Witness: Last June, a year ago. The 23rd.

Mr. Lavinsky: Would you read back what Mr. Porter did? Mr. Porter.

(The reporter read the last two answers of the witness.)

By Mr. Lavinsky:

Q. Did you have any other position before joining the Southern? A. Well, nothing. I have got about four acres of ground. I work around on it, and a cabinet shop in the basement.

Q. Did you ever work as a fireman before coming to the Southern? A. I did not.

Q. What was your schooling, Mr. Porter? A. Do what?

175 Q. Your schooling? A. Third grade. None.

Mr. Lavinsky: Your witness, Mr. Kramer.

Mr. Kramer: No cross-examination.

The Court: You may step down, Mr. Porter.

(The witness was excused.)

Mr. Lavinsky: Would you please call Mr. A. W. Lockett. Whereupon,

Andrew William Lockett

was called as a witness for and on behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavinsky:

Q. What is your full name, sir? A. Andrew William Lockett.

Q. Where do you live? A. I live at 933 47th Way, Birmingham, Alabama.

Q. How old are you? A. Sixty-one years old.

Q. Were you employed by the Southern in June of 1963? A. I was.

Q. Do you recall the date? A. June 29th.

176 Q. Do you recall when you made your first run?
A. I went out that same evening at four o'clock, four to twelve.

Q. For what position were you employed? A. Fireman.

Q. And you worked in the Birmingham Yards? A. Yes, sir.

Q. Were you asked to join the Brotherhood of Locomotive Firemen and Enginemen? A. Mr. Kramer: Objection, your Honor, on the ground whether he was ask to join or not asked to join is irrelevant as to whether the Southern is in contempt of Your Honor's order; and in addition, may I approach the Bench and have a Bench Conference?

The Court: Yes, you may.

(At the Bench:)

Mr. Kramer: This is worse than dirty pool. We knew they were going to somehow try to inject a racial issue in this case. Now whether the Brotherhood loves or hates colored people or whether the Brotherhood has any attitude at all about it, has nothing to do with contempt. They are trying to make this a racial issue. It is perfectly plain that is what they are trying to do. During all
177 of the course of stipulating they tried to get it in and we refused to stipulate anything about it. They made that demand for documents which they didn't follow through, all of which pertained to racial issues.

This is not a racial case and they are trying to make it that.

Mr. Day: On the grounds that we have not solicited this man or others. They are trying to show we are here for what purpose: we are concerned with having men employed whom we can ask to join the Brotherhood. It is in that way the racial issue is brought in, and I think it ought to be excluded.

Mr. Zorn: Your Honor, we have no intention whatsoever of introducing any racial issue. Had we decided to do that, we would have subpoenaed and put on the witness stand all of the Local Chairman of this organization with respect to their attitude and practices with respect to colored people.

Quite to the contrary, this witness will testify that he was admitted to the Union. Quite to the contrary, if we were trying to inject a racial issue into this case we would go down the line and argue about the exclusion of people by the constitution of recent amendment by their Local Lodges and we would be here for days on a racial situation of which these people are terribly sensitive.

178 Our purposes are not to do this. Our purpose is to show that among the new people who are hired by Southern they were solicited and joined the Union under constitutional provisions which say that you have got to be a fireman in order to be in the Union, contrary to every argument that Mr. Kramer has made here.

I assure your Honor we are not seeking to in any form trying to inject a racial issue into this case.

Mr. Kramer: Well, if he is not injecting it, if he doesn't raise it, that is something else. But up until now he has tried to raise it every time he has talked.

Mr. Zorn: That is not true. I very deliberately yesterday expunged in my record the reading of the constitution in examination of their witness and a provision of their constitution which was only recently amended.

The provision provided that only whites could join. I was very careful not to even mention that, your Honor, in the course of introducing any of the provisions of the constitution.

Mr. Day: That is true. But we have a right to assume this is another way of trying to accomplish your purpose.

Mr. Zorn: You must have a guilty conscience. He is a man you hired. He was asked to join your Union.

179 How can we have a racial issue when we are seeking to prove that you took him in.

Mr. Day: You just brought out or you asked the question "was this man solicited?"

Mr. Zorn: He was taken in. It is quite to the contrary of what you think we are doing.

We are showing he was admitted by your Union.

Mr. Day: It is the issue. But we have spent too many years in that miserable field of work.

Mr. Zorn: You are over-sensitive.

Mr. Kramer: It is getting bigger, and I don't think I want to be in it again, and I don't think it has a bearing in this case.

The Court: Wait just a moment. It is not in this case. So far as the Court is concerned it is not going to be in it.

Now this Court pays no attention to the fact that this man's color is white or black or anything else.

Mr. Kramer: Well, the Press is sitting around.

The Court: But you have brought it out on the record. Now it was not on the record. There has been no mention made.

Mr. Kramer: Well, we are simply concerned to see that it is not a part of this case. That is all.

The Court: All right, let's proceed, gentlemen.

180 Mr. Lavinsky: Would you please read back the last question?

(The reporter read the last pending question.)

Mr. Kramer: Your Honor, I have the same objection that I had to the previous witness testifying to the subject matter.

The Court: You have the same objection.

By Mr. Lavinsky:

Q. Would you please answer the question? A. I will.

Q. Were you asked to join the Brotherhood? A. I was.

Q. Who asked you to join? A. Mr. Van, the Local Chairman.

Q. Did you sign any papers at that time? A. Well, I did.

Mr. Lavinsky: Will you mark this for identification?

The Deputy Clerk: Defendant's number 3 for identification.

(Defendant's exhibit number 3 was marked for identification.)

By Mr. Lavinsky:

Q. Did you sign this wage assignment, Mr. Lockett? A. I did.

181 Mr. Lavinsky: I offer it in evidence.

The Court: It will be received. Your Objection will be noted for the record.

The Deputy Clerk: Defendant's number 3 in evidence.

(Defendant's Exhibit No. 3 was received in evidence.)

By Mr. Lavinsky:

Q. Did the papers you signed also include an application for membership? A. Yes, sir.

Q. But thereafter advised by the Brotherhood that your application for membership had been accepted? A. Yes, sir.

Q. Were you so advised by letter? A. That is right.

Q. I show you defendant's exhibit 2-B and ask you whether this is substantially the same letter which you received? Read it carefully (handing document to witness). A. This is practically the same letter. It seems to be the same word for word.

Q. What was your work before coming with Southern?

A. Well I had worked in the mines some, and then
182 I had driven a coal truck for a number of years.

Q. Had you ever worked as a fireman before joining the Southern? A. No, sir.

Q. What schooling did you have? A. Well I left school in the fourth grade.

Mr. Lavinsky: Your witness.

Mr. Kramer: No cross-examination.

The Court: You may step down.

(The witness was excused.)

Mr. Lavinsky: Call Mr. C. M. Redwine.

Whereupon,

Charles McKinley Redwine

was called as a witness for and on behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavinsky:

Q. What is your full name? A. Charles McKinley Redwine.

Q. Where do you live? A. Atlanta. 1695 North Druid Hill Road, Atlanta 19, Georgia.

183 Q. How old are you? A. Sixty-six.

Q. Were you employed by the Southern in August of 1963? A. Yes, sir.

Q. Do you recall the date of your employment? A. The date of my seniority is the sixth.

Q. That is the date you first made a run, am I correct? A. Yes, sir.

Q. For what position were you employed? A. Fireman.

Q. And was this in the Atlanta Yards? A. Beg your pardon?

Q. Was this in the Atlanta Yards? A. Yes, sir, yes sir.

Q. Were you asked to join the Brotherhood of Locomotive Firemen and Enginemen? A. The 18th I think is the day I filled out an application, sir.

Q. Who asked you to join? A. Mr. Huiet.

Q. Is he the Local Chairman? A. Yes, sir.

Q. Did you fill out any papers at that time? A. Yes, sir.

184 Q. What papers, if you recall? A. Application for membership, also a deduction—

Q. You mean a dues check-off authorization? A. That is right.

Q. Would you answer that for the record? A. Beg pardon.

Q. Please answer that? The record doesn't show a nod. Just answer yes or no. Did you sign a dues check-off authorization? A. Yes, sir.

Q. I show you this—strike that.

Mr. Lavinsky: Will you mark this?

The Deputy Clerk: Defendant's Exhibit No. 4 for identification.

(Defendant's Exhibit No. 4 was marked for identification.)

By Mr. Lavinsky:

Q. I show you this pay rate card and ask you if this was give nto you by the Local Chairman? A. Yes, sir.

Mr. Kramer: I object to this and all the other questions along this line.

The Court: You may have a running objection. The objection is overruled.

185 By Mr. Lavinsky:

Q. Did Mr. Heuit fill this out in your presence? A. No, sir.

Q. The writing was already on it when you received it? A. Yes, sir.

Mr. Lavinsky: I offer it in evidence.

The Court: It will be received in evidence.

Mr. Kramer: It is a schedule of payments of firemen of the Southern. Now how that gets in—

Mr. Lavinsky: It is signed bearing the name of the Local Chairman, the date, the Lodge, your Honor.

The Court: Well it has to do with,—yes, it will be received in evidence.

The Deputy Clerk: Defendant's number 4 in evidence.

(Defendant's Exhibit No. 4 was received in evidence.)

By Mr. Lavinsky:

Q. Were you thereafter advised by Mr. Heuit that your application for membership had been accepted? A. Yes, sir.

Q. And were you told where to come or when to come to take your obligation? A. Yes, sir.

186 Q. What was the date you were told to come? A. The third Wednesday of this month, at seven-thirty p.m. If working, some other date.

Q. Where did you work before coming with to the Southern? A. The Atlanta Transit System.

Q. What was your employment? What did you do? A. Well, I have done everything. Drive streetcars, buses, tractors-trolleys.

Q. When did you leave the Atlanta Street Railway System? A. The 23rd day of February, 1962.

Q. Did you ever work as a fireman before coming with the Southern? A. No, sir.

Q. What was your schooling? A. Well, a one-room school house in the country, about the fifth grade.

Mr. Lavinsky: Thank you very much.

Your witness, Mr. Kramer.

Mr. Kramer: No cross-examination.

The Court: You may step down.

(The witness was excused.)

Mr. Lavinsky: Could we have a recess for about five minutes, your Honor?

187 The Court: You may. Will you gentlemen come up here?

(At the Bench:)

The Court: I take it that you agree that these men that testified, that they have joined the Union?

Mr. Kramer: I understand that is how they testified, yes.

The Court: Because there is no cross-examination, and I just didn't want to get confused on the number one witness was clear, and on the second and third it wasn't clear. They did not have their letters.

Mr. Kramer: Oh yes. The second one was asked to read exhibit 2-A or B. That was the acceptance.

The Court: Yes. But that was Lockett's—

Mr. Kramer: He said he got the same thing.

The Court: He said he did get the same thing but he didn't have his.

Mr. Lavinsky: He didn't have his, no.

The Court: The question was not asked where his was, you see?

Mr. Kramer: No.

The Court: On this one the question was not asked.

Mr. Lavinsky: If your Honor please, with respect to the third man he had been notified by the Local Chairman orally that he was accepted, and all that was required was that he come to take an oath. There is a formality to joining. He was told when to report, which is the third Wednesday.

Mr. Day: The other two letters, by way of explanation, from Mr. Bryant, General Secretary and Treasurer of the Grand Lodge in Cleveland, it is necessary that he approve the entrance of a new member. That is all the significance of that.

The Court: The only point was, by there being no cross-examination, I take it it is all admitted.

Mr. Kramer: The testimony stands uncontradicted.

The Court: All right.

(Following the Bench Conference there was a short recess, following which the proceedings were resumed as follows:)

(In Open Court:)

Mr. Lavinsky: Call Mr. S. A. Ford.

Whereupon,

Sherman Alonzo Ford

was called as a witness for and on behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavinsky:

189 Q. What is your full name, sir? A. Sherman Alonzo Ford.

Q. What is your address? A. 418 Oglewood, Knoxville, Tennessee.

Q. How old are you, Mr. Ford? A. Sixty-one.

Q. Were you employed by the Southern in August of this year? A. Yes, sir.

Q. Do you recall the date? A. August fifth.

Q. For what position were you employed? A. Roadway foreman, or fireman.

Q. On the Knoxville Division? A. Yes, sir.

Q. Were you asked to join the Brotherhood of Locomotive Firemen and Enginemen? A. Yes, sir.

Q. By whom? A. Mr. Paul Seneker.

Q. Was he the Local Chairman? A. Yes, sir.

Q. Did you sign an application form? A. Yes, sir.

190 Q. Did you pay an application fee? A. Yea, sir.

Mr. Lavinsky: Mark this, please.

(Defendant's Exhibit 5 was marked for identification.)

By Mr. Lavinsky:

Q. How much was that pay? A. Five Dollars (\$5.00).

Q. I show you this paper and ask you whether this is the receipt you received for you application fee?

Mr. Kramer: Your Honor, I object to these exhibits or this line of testimony and ask that his previous testimony be stricken on the ground it is irrelevant and immaterial to any issue in this proceeding.

The Court: The objection will be overruled.

The Witness: Yes, sir.

Mr. Lavinsky: I ask that it be marked in evidence.

The Court: It will be.

The Deputy Clerk: Defendant's 5 into evidence.

(Defendant's Exhibit No. 5 was received in evidence.)

By Mr. Lavinsky:

Q. Did you also receive a rate of pay table? A. Yes, sir.

Q. From Mr. Seneker? A. Yes, sir.

191 Mr. Lavinsky: Please mark this.

The Deputy Clerk: Defendant's 5-B for identification.

Mr. Lavinsky: For the record, the receipt previously marked Exhibit 5-A will be marked exhibit—strike that.

For the record, the exhibit previously marked exhibit 5 will be marked 5-A.

The Court: Will be?

Mr. Lavinsky: Has been, your Honor.

The Court: Yes, all right.

By Mr. Lavinsky:

Q. Mr. Ford, I show you this card and ask you whether this is the rate of pay card you received from Mr. Seneker?

A. It seems to be same card.

Q. It is the same as the other card—

Mr. Kramer: Objection on the ground it is irrelevant and immaterial.

The Court: Overruled.

Mr. Lavinsky: I offer 5-B in evidence.

The Court: Let me see it before you mark it.

Mr. Lavinsky: Your Honor will note the name of the Local Foreman in pen, and the time of meetings. The Local Chairman. I am sorry.

The Deputy Clerk: Defendant's Exhibit 5-B in
192 evidence.

(Defendant's Exhibit 5-B was received in evidence.)

By Mr. Lavinsky:

Q. Have you been advised when your application for membership will be acted upon?

Have you been told when your application will be acted upon? A. Yes, sir.

Q. Who told you? A. Mr. Seneker, and also Mr. Kesterson.

Q. Who is Mr. Kesterson? A. I believe he is the Secretary of the Local.

Q. And what did they tell you that your, application would be acted upon? A. It was supposed to have been acted on the first Monday, but they had no meeting that night and they said it would be two weeks from that, which was a third Monday.

Q. What was your occupation prior to joining the Southern in August of this year?

Mr. Kramer: Do I have a running objection to all of this?

The Court: The objection will run through all of the testimony of this witness. Is that correct?

Mr. Kramer: Yes.

193 The Court: Is that what you want?

Mr. Kramer: Yes.

The Witness: A retired City Fireman.

By Mr. Lavinsky:

Q. What city, sir? A. Knoxville, Tennessee.

Q. When did you retire? A. August first, 1961.

Q. Were you ever a locomotive fireman before your present position with the Southern? A. No, sir.

Q. Were you ever previously employed by the Southern in any capacity? A. Yes, sir.

Q. When? A. In 1922 to '34.

Q. And what was your position, sir? A. I was a laborer, a watermaker apprentice, and was boilermaker helper.

Q. And this was work that was work that was performed in Southern shops? A. Yes, sir.

Q. What was your schooling? A. Country grade school.

194 Mr. Lavinsky: Thank you very much.
Your witness, Mr. Kramer.

Mr. Kramer: No cross-examination.

The Court: All right, you may step down.

(The witness was excused.)

Mr. Zorn: I would like to call Mr. E. M. Tolleson.

Whereupon,

Edward Macon Tolleson

was called as a witness for and on behalf of Defendants, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zorn:

Q. What is your full name, Mr. Tolleson? A. Edward Macon Tolleson.

Q. Your address? A. 2601 Whitley Place, Northwest, Washington, D. C.

Q. How are you employed, sir? A. I am employed as Executive Vice-President of the Carrier Corporation, forming the Southern Railway System.

Q. Would you tell the Court generally what your duties are, Mr. Tolleson, as Executive Vice-President? A.
195 Generally, I supervise the operating department, the sales department, and the rail highway service or the piggy-back department.

Q. How long have you been employed by Southern Railway System? A. Since 1919.

Q. And that would be? A. About forty-three years.

Q. Without going into detail, Mr. Tolleson, could you tell the Court briefly what various positions you have held with Southern since you were first employed in 1919? A. From 1919 until 1936 I held various positions in the operat-

ing department. In 1936 I was appointed Assistant Trainmaster. Thereafter, I served as Trainmaster for several operating divisions. I was a Division Superintendent for more than ten years. I was made General Superintendent of Transportation at Charlotte, North Carolina in 1952; appointed as Assistant Vice-President of Transportation in Washington in 1954, I was made operating vice-president on November first, 1960; and Executive Vice-President on February first, 1962.

Q. Now have these various positions you have just described, which you have occupied over these years, required you to be familiar with the operating rules of 196 the Southern Railway System? A. They have.

Q. And are you familiar with these various operating rules? A. I am.

Q. Would you tell the Court what on the Southern Railway System is meant by "operating rules"? A. Operating rules are those rules that govern the movement of trains and engines, and the duties of the employees engaged in those operations.

Q. Now these operating rules you have just described briefly are any of those contained, or have they ever been contained in any collective agreement with any labor organization? A. No sir, they have not.

Q. These operating rules, various of them, over the years, do they appear in a separate booklet prepared by the Operating Department of Southern Railway and distributed by it? A. Yes sir, they do.

Mr. Zorn: Please mark this.

(Defendant's Exhibit No. 6 was marked for identification.)

By Mr. Zorn:

Q. Mr. Tolleson, I show you a booklet entitled on its cover "Southern Railway System Book of Operating Rules." I will ask you to describe to the Court what 197 this book is. A. This is, as you said, the Southern

Railway System Book of Operating Rules that were promulgated in 1943 and it contains the changes made from 1943 through July 1956 in the Southern's operating rules.

Q. Just so that it is clear to the Court, the rules contained in Defendant's Exhibit 6 for identification were the operating rules promulgated in 1943; is that correct? A. Yes, sir.

Q. And the exhibit or the book also contains revisions, changes or additions which were made between the period 1943 and 1956; is that correct? A. Yes, sir.

Q. And just to anticipate, so it is clear, there was another, or there was a general revision of operating rules made in 1956? A. That is correct, yes.

Mr. Zorn: Your Honor, I would like to offer in evidence defendant's exhibit six for identification.

Mr. Kramer: Objection, your Honor. This exhibit, like their exhibit number one, has no relevance or materiality to whether the Southern is now operating in accordance with your Court's order.

The Court: The objection will be overruled.

198 The Deputy Clerk: Defendant's number 6 in evidence.

(Defendant's Exhibit No. 6 was received in evidence.)

Mr. Zorn: Would you like a little time to run through that?

The Court: No. This is from '43 to '56?

Mr. Zorn: Yes, sir, that is right.

The Court: All right.

Mr. Zorn: Promulgated, and the stickers in there will describe, which the witnesses will describe more in detail later, are revisions from '43 to 1956.

By Mr. Zorn:

Q. Mr. Tolleson, what type of motor power was in use on Southern Railway System when these 1943 rules, defendant's exhibit 6, were promulgated? A. Almost entirely steam power.

Q. And at that time—now referring to 1943—what were the duties of firemen who worked on steam locomotives?

Mr. Kramer: Objection. The duties, in 1943, on steam locomotives is a subject that has no relevance to this proceeding.

Mr. Zorn: We intend to show through this witness, your Honor, that over a period of many, many years, 199 the Southern Railway System has issued, promulgated and issued operating rules with respect to the requirement of duties for various crafts; that the duties set forth in those operating rules have never been the subject of collective bargaining; that there have been revisions, additions, changes in those operating rules affecting various crafts, based upon technological improvements based upon operating experience; and that this is a matter which has always been a sole management responsibility.

We will get into the question of why they were changed on July 1st, 1963, which is Mr. Kramer's complaint in this case. I think this is the necessary background for that.

Mr. Kramer: The fact that the rules have been changed from time to time is already in evidence.

Mr. Zorn is now indicating he is going to also present evidence concerning the need of Southern for firemen.

Mr. Zorn: I have not said that.

Mr. Kramer: That is what I understood him to say.

Nothing could be further removed from what is relevant in this case than the question of need for a fireman. That is an issue which will be resolved elsewhere. That is an issue which with respect to all the other railroads of the country, except the Southern, will be resolved in the next ninety days or so by an Arbitration Board created by Congress. Such issue cannot be decided by this Court, 200 and certainly should not be decided by this Court, and is not involved in any issue before this Court.

The Court: Now, Mr. Kramer, hearing this matter without a jury, wouldn't it be relevant? Because I presume that you agree that the operating rules have not been the subject of collective bargaining?

Mr. Kramer: Well, the book of operating rules I think has not been a subject of collective bargaining. But many matters contained therein have been.

Mr. Zorn: There is no proof of that.

The Court: Now the question that we subsequently I presume will be confronted with is a change of rules, in operation, in July of 1963.

Mr. Kramer: I think that has nothing to do with the case.

The Court: It has nothing to do with it?

Mr. Kramer: Nothing.

The Court: And the Southern has the right to change those rules?

Mr. Kramer: The Southern can issue any documents it pleases.

The Court: The Court will sustain your objection.

Mr. Kramer: As to whether the rules have been changed has nothing to do with this case.

201 The Court: The Court will sustain the objection, and you will not argue the point.

Mr. Kramer: The change of rules?

The Court: The change of rules was promulgated in July of 1963 and you have no complaint with it.

Mr. Kramer: I have no complaint over the change?

The Court: Yes.

Mr. Kramer: Well, of course, the rules were changed—

The Court: Wait just a moment. You can't take both sides of the question, Mr. Kramer. Take one or the other.

Mr. Kramer: No, I say whether they were changed or not is irrelevant to this case. That is my argument. That they can't by issuing a book of operating rules change a statute, by issuing a new book of operating rules change the content of your order.

The Court: The objection will be sustained.

Mr. Zorn: I might suggest, your Honor, that on the basis of Mr. Kramer's present position, the testimony of all his witnesses yesterday is now completely irrelevant.

The Court: We will discuss that later.

Mr. Zorn: Because his complaint is completely irrelevant.

To protect the record I had perhaps better make
202 an offer of proof.

I will make the offer of proof. We are prepared to prove through this witness, Mr. E. M. Tolleson, that over a period of many years the duties and the work performed by employees in various crafts, including firemen, on the Southern Railway System, were controlled by operating rules issued by the Southern Railway System which prescribed the required duties of employees;

That employees were required to follow the duties perscribed by them in the operating rules as they were amended and revised from time to time;

That over the years there has never been any discussion, consultation, or negotiation, with any labor organization, including the Brotherhood plaintiff in this case, with respect to the nature and content of any of the operating rules issued by Southern Railway.

Further, that over the years, and in the various revisions of the operating rules which we offer to show the necessity for revisions being produced by factors such as technological improvements and operating experience brought about the necessity for revisions of various types of rules affecting various crafts;

And that in that connection over the years, in various
revisions and deletions of old ones, duties formerly
203 required of different crafts have been eliminated,
and in some cases, in addition to the duties being eliminated by reason of technological advances such as in radio communications, the actual employees themselves were eliminated by reason of the elimination of these required duties which were no longer necessary by reason of other developments either in terms of technology, new equipment, new type of power, or by operating experience;

We also offer to prove that at no time has there been any complaint from any labor organization representing

the various employees in the different crafts of Southern Railway System with respect to either the right of issuing these rules or with respect to the content or nature of rules changes made over all of these years of which there have been a great many;

We also are prepared to prove, and I don't know whether your ruling encompasses this aspect, your Honor. We are also prepared to prove that by reason of operating experience and consideration of the problem and consideration of experience of trains run without firemen, based upon primarily the dieselization of the railroad from steam to dieselization, management arrived at the decision that the work formerly performed by firemen could
204 be performed efficiently and safely by the engineer or the head brakeman.

Now I don't know whether your ruling encompasses that, nor whether it encompasses the reason of why the rules were changed in 1943. So I am a little at a loss.

The Court: My understanding, so that it is clear for the record, is that Mr. Kramer does not object or does not state that the operating executive of the Southern does not have the right to change the operating rules.

Mr. Zorn: Well, does he concede, your Honor, that when operating rules are changed, which control and determine the duties of any craft of employees, first, that it is entirely within management's judgment to do that without consultation or discussion with the Union?

The Court: I understand that is Mr. Kramer's position, that he recognizes that they have the right to set the operating rules, and that they have set the operating rules in this case. But it is not material to this issue.

Mr. Kramer: I think I have been misunderstood. I recognize that they have changed the rules. I do not recognize that they have the right to change the rules without limit. But whether they have that right or don't have that right is irrelevant to the issues in this case. I do not

admit that they have that right without limit. I do
205 not concede that they can simply transfer work
from one craft to another. That would be a violation
of our collective bargaining agreement. But that is
nothing for you to consider. That is not involved in any
issue in this case.

Of course I do not concede they can do anything they
want with operating rules. But they made this change
in July 1963. I don't say that was valid, invalid or either.
My personal opinion is that it was invalid. But it is not
relevant to any issue in this case.

Perhaps I should elaborate.

The Court: I wish you would.

Mr. Kramer: There are certain limitations on what
management can do in the Railway Labor Act and the
provisions of that act that are involved here, Section 2-
seventh, Section five, and Section six. Your Honor is
familiar with those provisions. We have argued it through
a long time.

There are other limitations about what management can
do in the way it operates that may arise from an agree-
ment with a collective bargaining agent or someone else.
I would take the position they cannot by changing their
operating rules change the requirements of a statute or
change the requirements of an agreement or in this case
change the operation of them. If they entered into
206 an agreement to do certain things or if a statute
requires them to go through certain procedures
before they can change working conditions, or if your
Honor has ordered them to do nor not to do something,
they can't change those requirements by changing their
operating rules.

Mr. Zorn: If your Honor please, yesterday Mr. Kramer
put on a parade of witnesses for the purpose of demon-
strating to this Court in infinite detail every duty that
a fireman had at sometime or other performed.

Mr. Kramer's complaint was that somehow when we modified or revised our rules not to require these duties any further, by some wild stretch we were seeking to evade your order.

I think that certainly, if your Honor is paying any attention to that position, that it seems to me if Mr. Kramer is willing to stipulate, that would be fine. But it seems to me that we are entitled to show that operating rules which are the instructions under which employees work and which tells them what duties they are to perform or not to perform, have been exclusively within the province of management without regard to any statute, without regard to any contract, and certainly without respect to any order in this case, because historically—and this is the purpose of this testimony—historically we can
207 establish this to the hilt, and we can establish further that in the course of exercising its responsibility to run this railroad and to tell employees what they were required to do or not to do, there have been other instances, and this is by no means the first, where duties of various crafts have been eliminated or without protest from a labor union or without litigation, because everybody over the years has recognized, and every labor organization, including this one, which is on the Southern property, has recognized that the question of rules with respect to employees' duties is something that management and management alone can determine, based on its judgment and based on its experience.

Now am I to be foreclosed from proving that if Mr. Kramer has had his day in court yesterday, with testimony which I objected to very very vigorously because it has no place in this case?

Mr. Kramer: Mr. Zorn misconceives the testimony we offered, and which was accepted.

This Court's order,—it is really very simply, and I don't know how Mr. Zorn—

The Court: Now wait. I understand the situation . My point is, I don't understand why you would object to the testimony of this witness, when certainly one of the main factors that we have to consider is bad faith.

Mr. Kramer: Oh yes. Of course, I think the bad
208 faith is evident.

The Court: But you are conceding at the present time, as the Court understands by your objection, that the Railroad has the right.

Mr. Kramer: No I don't think I am.

The Court: Well then, you had better withdraw the objection so that you can cross-examine this witness.

Mr. Kramer: No. I am objecting on the grounds of relevance. I say whether they have the right or don't have the right has nothing to do with whether they violated your order.

The Court: How is the Court going to determine the bad faith?

Mr. Kramer: Because they knowingly did what they did. Your order said "use firemen the way you used them in 1959", until certain things happen.

Mr. Zorn: With what we disagree. Your Honor knows best.

Mr. Kramer: You said use them the way you did in 1959, or until something else is done, some other proceeding is finished.

For me to prove they have not done that, I must prove that what they are doing now and what they did in 1959 and show that it is different. That is what I put the evidence in for; not to show that these were their
209- obligations or the operating rules in 1959 or the
210 rates of pay in 1959; but just to show what they did. Because the stipulation shows what some of these men are doing now. All I have to show is that they are different, and there is a violation of your order, a substantial difference, of course.

Mr. Zorn: Mr. Kramer, if you will stipulate that prior to 1959 management had the unrestricted right to change and modify rules and equally had that same unrestricted right to change and modify operating rules after 1959, we may be able to say a little time.

Mr. Kramer: Your Honor, in 1959 and before that, at least since 1926 or probably 1920, and now, they do not and have not had the unrestricted right to make changes. As I stated before, they are limited by statutory provisions and collective bargaining agreements. In this case, further restricted by a Court's order.

Mr. Zorn: Mr. Kramer's statement is based on nothing in the record of this proceeding.

The Court: Are you objecting?

Mr. Kramer: Yes.

The Court: All right. The objections will be sustained.

Mr. Kramer: I may say I am objecting on the grounds of relevancy.

211 The Court: The objection is sustained.

Mr. Zorn: In view of your ruling, your Honor, may we have a few minutes recess to organize?

The Court: All right.

(There was a short recess, following which the proceedings were resumed as follows:)

Mr. Zorn: If your Honor please, in view of the Court's ruling, we will not go into any further oral testimony from Mr. Tolleson with respect to operating rules changes between 1956 and 1959. 1956 and 1963.

However, I would like to identify for the record those changes, without oral testimony, as the background for the changes made in 1963 and the 1963 operating rules are already in evidence and I will ask Mr. Tolleson questions about that, going to the good faith question of Southern's compliance.

I would like at this time to have marked for identification,—and I say without oral testimony—a general revision

of Southern's operating rules which were made effective August 1, 1956, if I may have that marked for identification, that is the green book (indicating).

And as defendant's exhibit eight for identification, a series of documents which constitute revisions in operating rules between 1956 and 1963, without any oral testimony.

Can we have these marked?

212 The Deputy Clerk: Defendant's Exhibits 7 and 8 for identification.

(Defendant's Exhibits Nos. 7 and 8 were marked for identification.)

Mr. Zorn: I would like, so that the record has sequence and background for our good faith position, to offer these two exhibits, defendant's 7 and defendant's 8 for identification, into the record, at this time (showing documents to opposing counsel).

Mr. Kramer: No objection.

The Court: All right, they will be received without objection.

(Defendant's Exhibits Nos. 7 and 8 were received in evidence.)

By Mr. Zorn:

Q. Mr. Tolleson, I show you a document which has already been introduced in evidence as Defendant's Exhibit 1, which are the revisions of operating rules issued by Southern Railway System effective July 1st, 1963.

Are you familiar with that document? A. I am, yes, sir.

Q. Can you tell the Court what the revision of rules contained in defendant's exhibit 1 was intended to accomplish? A. This was intended to eliminate duties of
213 firemen in road, freight and yard service.

Q. Mr. Tolleson, what were management's reasons for making the changes incorporated in defendant's exhibit one? A. We were of the opinion that our August

1956 rules with respect to the duties of road, freight and yard firemen, carried requirements that were in the nature of make-work rules. Because those duties could have easily have been performed by the head brakeman and the engineer. This opinion was certainly borne out by our experience in running trains without firemen.

From 1959 until June 1963, we did not hire any firemen.

Q. Any new firemen? A. Any new firemen.

When in June 1963 we received the order of the Court that caused us to have to start and hire some two hundred new firemen, we were of the opinion that there was no longer any necessity for perpetuating in our book of rules these make-work rules for road, freight and yard firemen, and to get away from this fictional basis it became very pressing that we revise the rules in our book of operating rules and delete therefrom those duties that related to the road, freight firemen and the yard firemen.

Q. Now the duties required of firemen are the
214 rules prior, the operating rules prior to defendant's exhibit one, actually required firemen to perform certain duties; is that correct? A. That is right.

Q. I take it then, that it was a management decision, as you have described it, that those duties were not necessary and the requirements for those duties could and should be eliminated; is that correct? A. That is correct.

Q. Now defendant's exhibit one, in effect, states that duties previously required of firemen in road, freight and yard service, would no longer be required of firemen; is that correct? A. That is right.

Q. And defendant's exhibit one applied equally to people newly hired as well as to older firemen; is that correct? A. That is correct.

Q. So with respect to older firemen, men on the line for any number of years and operated as firemen, under the new operating rules they were not required to perform any duties; is that correct? A. That is correct..

Q. And if they were not required to perform any
215 duties, could they be disciplined for failure to perform any duties which they might previously have performed? A. They could not.

Q. Now where these revisions eliminating requirements for firemen's duties contained in defendant's exhibit one communicated to all the firemen employed by Southern, and if so, how? A. They were communicated to all firemen who were in service, and who had previously been governed by the rules that were in effect prior to January one, by means of this bulletin, on the date of July one, which states, "The following deletions and changes are made in the book," and it specified the deletions and the changes, for July one.

This notification was given those men through the medium of the bulletin boards. As can be seen in the final paragraph of this bulletin, "stickers covering these changes will be distributed and should be affixed in the proper place in the book of operating rules."

Q. And in promulgating and issuing the new rules eliminating the duties of firemen on road, freight and yard service, Mr. Tolleson, was it the intention of Southern, by doing that, in any way to evade the order of this
216 Court or to fail to comply therewith? A. It certainly was no such intention as that.

Q. Did Southern consult for or negotiate with the Brotherhood of Firemen concerning this rules revision, that is the revision contained in defendant's exhibit one? A. We did not.

Q. Had you ever consulted with the Brotherhood on any rules? A. We have never consulted with the Brotherhood on any rules changes. They are operational management. We have never consulted nor negotiated with the Brotherhood on it.

Q. Mr. Tolleson, since the issuance of defendant's exhibit one and its promulgation and communication to all firemen employed by Southern, who to your knowledge is

performing the duties formerly required of firemen under previous operating rules? A. To my knowledge the head brakeman and the engineers are performing the duties.

Q. And as I understand it, so it will be clear to the Court, Mr. Tolleson, under these new rules firemen, whether they be older firemen or new firemen, are not required to perform any of the duties which are contained in the earlier operating rules; is that correct? A. That is correct.

Q. Would you know whether some of the older
217 firemen however, would still be performing some of the duties they previously performed? A. It is entirely possible that they are. I can't say that they are not. They are certainly not required to do that. I think they understand that. Any man that has been in service and knows anything about what rules are and when the rules came out, he knew what the rules required.

Mr. Kramer: I move the last part be stricken. Mr. Tolleson is not in a position to know what those men know.

The Court: It will be stricken.

By Mr. Zorn:

Q. From your vast experience on this railroad in all of the operating capacities which you have had over all of these years, is it the fact that the basic instructions controlling duties of employees and requirements for duties of employees are and have always been contained in your operating rules? A. That is right, sir.

Q. Now you had mentioned duties being performed by head brakemen and engineers; are those employees, the head brakeman and engineers, represented by labor organizations? A. Yes, they are.

Q. By whom are the head breakemen represented? A.
218 Brotherhood of Trainmen, and the head brakemen are represented by the Trade Management.

Q. And generally on Southern which labor organization represents the great majority of your engineers? A. I would say the Brotherhood of Locomotive Engineers.

Q. Since the issuance and promulgation of defendant's exhibit one, to your knowledge, have either the Brotherhood of Trainmen, representing the head brakemen, or the Brotherhood of Locomotive Engineers representing any engineers, made any complaint whatever with respect to these changes of rules? A. No, sir, they have not.

Q. Mr. Tolleson, there was a period prior to the Court's order here when Southern ran a considerable number of trains without any one being assigned to the fireman's seat; is that correct? A. That is correct, yes, sir.

Q. And just taking one part of that period, did you have a survey made of the company's records to determine how many trains and engines were run without firemen between November first, 1961, and June 30, 1963, and if so, what was the number of trains so run? A. I had such a survey made and the number ran thirty-three hundred and three, I believe.

Q. And did you also, in that connection, have a
219 survey made of the Company's records to determine if there were any accidents on any of these three thousand three hundred and thirty trains and engines being run without a fireman?

Mr. Kramer: Objection, your Honor. Mr. Tolleson is now being asked to testify as to the need of firemen. That issue is not before your Honor.

The Court: The objection is sustained.

Mr. Zorn: On that point, your Honor, so that the record is complete, I would make an offer that if permitted we could prove that there was not a single accident of any kind whatsoever with respect to these three thousand three hundred thirty trains run without any firemen being assigned.

Mr. Kramer: May I inquire of the reporter what the period was?

Mr. Zorn: November first, 1961, to June 30, 1963.

Mr. Kramer: Eleven-one '61, to June 30, 1963?

Mr. Zorn: That is correct.

Mr. Kramer: Is this in road, freight and yard?

Mr. Zorn: Road, freight—clarify it.

The Witness: Road, freight and yard service; that is right.

By Mr. Zorn:

Q. Mr. Tolleson, there is a part of the record of this casea stipulation which has been entered into between the parties, which contains an exhibit "G" which lists the ages and the numbers of people at various ages who were hired by Southern since the issuance of this Court's order.

I would like you to see that (exhibiting document).

In addition, our stipulation provides that the men referred to in paragraph seven of the stipulation, who are the newly hired men, hired by Southern pursuant to this Court's order, and I continue, "were employed pursuant to instructions by Southern to hire men sixty years of age or over."

I would like to ask you the reasons why the instructions for hiring new men issued by Southern were to hire them at the age of sixty and thereafter.

Mr. Kramer: Your Honor, Mr. Tolleson is being asked to explain why they took the action described in paragraph seven of the stipulation.

The final paragraph of the stipulation reads as follows:

"Except as otherwise expressly provided herein, the parties shall be precluded from introducing any evidence, whether on direct examination or through cross-examination, with respect to any of the facts set forth in paragraph four through fifteen of this stipulation."

221 Mr. Zorn: Mr. Kramer has obviously forgotten to look at paragraph eight which reads as follows, and I quote:

"The men referred to in paragraph seven above"—

Mr. Kramer: I withdraw the objection. I am sorry.

The Court: All right.

Mr. Zorn: Will you read it (handing document to witness).

The Witness: Our reason for these, they were under negotiations before the National Mediation Board, the question of continued employment of firemen.

We had believed and still believe that that matter will be settled on the basis of attrition. With that belief in our minds, if we had hired younger men, we would have had them on our payrolls for many years, had it not been settled on the basis of attrition. Therefore, to employ younger men under those circumstances, would have, in our opinion, been just plain foolish.

By Mr. Zorn:

Q. Well let's see if we are clear, Mr. Tolleson. I understand your testimony, you were referring to a proposal with respect to a new contract which is still pending, not the dispute over the old contract but a new contract?

A. Right.

222 Q. Which is presently before the National Mediation Board and which still remains unresolved? A. That is correct.

Q. As I understand your testimony, it is the belief of Southern management and has been its belief that that at sometime will be resolved on the basis of eliminating firemen by some kind of attrition? A. Right.

Q. Without the details as to specifically what will happen? That has been your belief? A. That is right.

Q. It was on that basis that if that should happen, and you had hired a great many young men, you might find yourself in some difficulty if you ultimately resolved the major contract dispute on some attrition basis; is that right? A. That is exactly right.

Q. Mr. Tolleson, has it been, and is it the intention of

the defendants to comply fully and in good faith with this Court's order? A. Absolutely so.

Mr. Kramer: I object. It is completely a self-serving statement. The inference is to be drawn from the facts and not from his statement.

The Court: The objection will be sustained.

223 By Mr. Zorn:

Q. And has Southern, to your knowledge, attempted in any way to evade or to fail to comply with this Court's order?

Mr. Kramer: Same objection, your Honor.

The Court: The objection will be sustained.

Mr. Zorn: I have no further questions, your Honor.

Mr. Kramer: Will we continue with cross-examination or adjourn now?

The Court: How long do you think you will take?

Mr. Kramer: It depends on the answers I get. I don't think it will take very long.

Mr. Zorn: I don't know what else Mr. Kramer has. But I can tell you, your Honor, now that we can expedite this case and get out of your court room, if we can proceed quickly because I probably will have no further witnesses.

Mr. Kramer: It might take a half hour. I don't know.

The Court: It may take a half hour?

Mr. Zorn: I think if we can finish, before recess, it will be helpful for all of us. You may want to hear some argument on the case later.

Mr. Kramer: From the basis of the present testimony I would have extremely little rebuttal. In fact, all I can think of now is perhaps the fact—

224 The Court: We have an immediate problem.

Let's take care of that first.

Mr. Kramer: Shall we proceed, or recess?

The Court: We will proceed.

In the event it is going to take an unreasonable time, the

personnel of the Court likes to have their lunch as well as everybody else, I presume.

Cross-Examination

By Mr. Kramer:

Q. Mr. Tolleson, you testified that the promulgation of rules on July first, 1963, the rules changes, was done because you had come to the conclusion that the engineers and brakemen could do the work that the firemen performed; is that your purpose in issuing the rule? A. Well,—

Q. Is that the basis of your issuing the rules changes? A. The basis of our making the changes were that these duties that had been required of the firemen were nothing more or less than assisting duties, at best. They were not absolute governing duties. The head brakeman had always been charged with the responsibility of head-in protection. He had always been charged with the responsibility of look-out. The engineer had always been charged with responsibility of checking
225 gauges, and being absolutely responsible for the movement of the train in accordance with the signal indications. Those were duties that could readily be performed by the head brakeman and enginemen. Because they were thoroughly experienced in doing it. They could take care of it without in any way affecting the safety of operation.

Q. Didn't the firemen protect the head-in? A. When it was necessary, they have at times protected the head-in. It was not a sole function of their's?

Q. Who performed the adjustments of malfunctions while the train was in motion? A. There were very little malfunctions that the firemen could do anything about, actually. The diesel performance has improved over the years, and in our experience there is not too much if anything that a fireman can do. Certainly anything he can do, the engineer can do.

Q. But who did it? While the train was in motion?
I will take that question back.

Could the engineer do it while the train was in motion?

A. If there was a malfunction that had to be corrected the engineer could and does stop the train to do that. We have no objection to that being done.

226 Q. The engineer could and did not do it while the train was in motion, did he? A. I don't know what malfunctions you have reference to. You give me general characterizations here. Actually my experience, and you asked for my experience—I assume that is what you are doing—is that firemen, as such, know very little and there is very little that they can do about a Diesel engine.

Q. Suppose a motor should stop in one of the rear units while the train was in motion; who would start it? A. The engineer would stop the train and start the motor.

Q. Is that what he did formerly? A. There may have been cases where the fireman did that. He certainly wasn't required to do that. There was nothing in our rules that said he was to correct malfunctions.

Q. Mr. Tolleson, I believe you stated that the firemen knows nothing or very little if anything about the correction of malfunctions. A. I said that has been my experience.

Q. Do the engineers know any more? A. A good many of them do.

Q. How many engineers do you have who are not
227 firemen, excluding those you recently hired? How many engineers? A. How many engineers are not firemen? All of our engineers at one time have been firemen.

Q. And don't both of them work sometimes as engineers and sometimes as firemen except those with the very highest seniority? A. That is true.

Q. When does the engineer learn or acquires this additional knowledge in the course of making these adjustments? A. Unfortunately, the engineer can't do anything about them. We have to get somebody else.

Q. But in those cases where he can, where does he acquire this knowledge? A. He has probably acquired that knowledge from being on the engine.

Q. Being on the engine as a fireman? A. He might have acquired it as an engineer.

Q. He might have acquired it as a fireman; is that right? A. That is possible.

Q. Up until July first, 1963, Mr. Tolleson, who normally made these adjustments or corrections; the fireman or the engineer?

228 Mr. Zorn: Your Honor, I think it would help clarify the record if Mr. Kramer would be more specific in his questioning. Because he has asked about malfunctions or adjustments. I don't know whether the witness knows what he is talking about.

By Mr. Kramer:

Q. Let's take two items. I mentioned one, a motor stopped while the train was running. That happens, doesn't it? A. Yes, it happens.

Q. Now what is that device that is used when a motor is used as a generator or to make it a brake? You have something that dissipates— A. The ground relay?

Q. I don't know what it is called. It is a bar which gets heated up to dissipate the electricity when the motor is used as a generator in order to use it as a brake. Is there not such a device? A. There are certain things that would cause a motor to stop. I don't know exactly what you are talking about.

Q. I am talking about a different subject than a motor stopping. The motor stopping was one malfunction. I am now giving you an example of another malfunction that may or may not occur. A. What is it?

229 Q. Isn't the motor sometimes used as a brake by making it a generator? A. Do you mean dynamic braking?

Q. That is exactly what I mean. What happens to the electricity that is generated when you have dynamic brak-

ing? A. The action is reversed. Instead of pulling power it is braking power.

Q. What happens to the electricity thereby generated?

A. It is dissipated.

Q. How? A. It is dissipated through the traction motor.

Q. Well you don't use it as a generator and a traction motor at the same time, do you? A. The traction motor certainly functions in the dynamic braking.

Q. Isn't there a bar that gets heated, a grid that gets heated to dissipate? A. Do you mean the dynamic brake grid? Is that what you are talking about?

Q. Yes. A. Yes.

Q. Doesn't that get overheated at times? A. I am sure it does.

230 Q. What happens then? A. It is automatically taken care of.

Q. How? A. By the device on the locomotive itself to take care of it.

Q. How does it take care of it? A. I can't describe the exact electrical functions of it.

Q. Isn't there a blower that blows on it? A. Yes, there is.

Q. Doesn't the blower sometimes fail to operate? A. Yes, the blower does sometimes fail to operate.

Q. Isn't that repaired in transit? A. Not always, no.

Q. Sometimes? A. I don't know of cases where the blower has been repaired in transit, no, from my own knowledge.

Q. Isn't an adjustment made in it? A. By the fireman?

Q. Yes. A. Not that I know of.

Q. By anyone? How about shop people, in transit? A. Not that I know about in transit.

Q. Doesn't a Diesel engine sometimes get insufficient fuel because the filter is clogged or some other reason? A.

Yes.

231 Q. Or some valves? A. It does.

Q. What is done to correct that? A. Generally, it is a shop job.

Q. Isn't that done in transit? A. I don't know of cases where it is done in transit. It could be.

Q. You don't know of cases where firemen have replaced or cleaned a filter in transit? A. No, I don't, offhand.

Q. Would you dispute that it is done? A. I couldn't dispute it if I don't know that it has happened.

Q. You don't know that it hasn't happened? A. That is right.

Q. Doesn't the Diesel motor sometimes get overheated due to lack of cooling water? A. Oh yes. If it lacks cooling water it certainly does.

Q. Does that happen in transit? A. Yes, it does.

Q. Are adjustments made to correct that? A. Generally they have to get water.

232 Q. Who does that? A. At places, the shop people put it on. It can only be done or gotten at a point where water is supplied. You can't get it en route until the train stops.

Q. Can't it be corrected before it gets to a shop? A. Not when it is out of cooling water.

Q. Can't it get it at any station? A. At most every station. Not every station is supplied with cooling water, no.

Q. Almost all of water or stations have water, don't they? A. That is right.

Q. And at what percentage of stations are there shops? A. Well it depends on what sort of a train you are talking about. For instance, the 153 to Monroe, Virginia, 165 miles, it doesn't stop at all.

Q. What percentage of the stations on the Southern Railway System where any train stops do you have shops? A. Do we have shops?

Q. Yes. A. We have some mechanical force at practically all major terminal points. Our major Diesel points are Chattanooga, and Atlanta.

233 Q. The question was, at what percentage of stations where Southern Railways stops do you have

shops,—any station? How many stations do you have? A. Now you are talking about passenger stops, or what?

Q. No. How many stations does the Southern Railway System have? A. I can't tell you offhand just exactly how many stations we have. When you say "stations" I assume you mean where an agent or someone is employed, or where the passenger train stops?

Q. Or a local freight. Now can you estimate how many you have? A. Well we have twenty-one operating divisions. I would say roughly you could say there were as high as twenty stations to the division. So that is some 450 to 500 stations.

Q. How many shops do you have? A. Let's define "shops".

Q. It is a term that you used. How did you use it? A. When I say "shop people" that doesn't necessarily mean a shop where a general overhaul is done. It means a point from which engines are dispatched. From their initial point. We have those at all crew changing points. We have a mechanical force who is capable of doing something about a Diesel engine.

234 Q. And how many of them are there? A. Well I would have to run through my mind and count them by divisions. There is one at Monroe. Between here and Atlanta there is one at Monroe; there is one at Greensboro; one at Spencer; one at Charlotte; there is one at Spartanburg; there is one in Greenville; there is one at Atlanta; then we get over to the other side of the railroad going down the Cincinnati line, and there is one at Cincinnati; one at Danville; one at Somerset; Chattanooga; Oakdale; Birmingham; Meriden; New Orleans.

Over toward the east there is Anniston, Atlanta, down to Macon, to Jacksonville, to Brunswick.

On the St. Louis-Louisville line, East St. Louis, at Huntingburg, Louisville.

On the division going to—or from Charlotte to Charleston, into Columbia, you would have it at Columbia, and at

Charleston; at Knoxville; Bristol; Asheville; those would constitute the majority of the shop points, that is where we have mechanical forces.

Q. Mr. Tolleson, do ground relays cut out at times en route due to a short or a blown fuse? A. Yes, they do.

Q. And until July of this year who replaced the
235 fuse or corrected the short? A. The engineers did, and I am sure at times the firemen did.

Q. The engineer did not do it while the train was moving, did he? A. Oh no.

Q. Now with respect to the conclusion you reached, to change the work rules because you concluded the engineer and brakeman could do all the fireman was doing, when did you reach that conclusion? A. We had been of that mind for several years. As I say, in our experience in operating trains without firemen we found that we could very easily have these things done even by the engineer or at shop points by the shop forces, and that these things that might have been done by the fireman could easily be done by the others, that is, by the engineer—not the head brakeman. He didn't perform anything other than lookout duties and flagging duties. He certainly didn't attempt to do anything about the Diesel engine. But certainly the engineers did, and our shop people did. They did it to our entire satisfaction. In other words, we did it with a very good train operation.

Q. The question, Mr. Tolleson, was when did you reach that conclusion? A. We reached that conclusion as
236 on our experience, would be 1956, and through this period of running trains without firemen, as I have previously testified; and certainly when it came to the time when we employed new firemen we saw no point in continuing the rules that had to do with any function that we say might previously have been done by them.

Q. Well you reached the conclusion sometime between 1956 and 1959. Do I understand you correctly? A. It was a growing thing, as we experienced it. It wasn't an abrupt

conclusion. It was something that we gained from experience, just like we gained in changing any of our other operating rules. They are based on experience.

Q. All right. That conclusion reached maturity, I take it, in 1959? Did it not A. Reached what?

Q. Reached maturity? A. We were very well convinced at that time, when we ceased to hire firemen, yes, that we could run trains without firemen.

Q. That was after 1959, wasn't it? A. No, I said from 1959—from 1959 on, we did not employ any new firemen. I said this conclusion was based on experience. It ran through that entire period there.

Q. Had you not concluded in 1959 that you didn't
237 need firemen? A. We did conclude that we really didn't need firemen. I said we did conclude then, because we ceased to hire firemen.

Q. But you didn't reach that conclusion on the basis of running trains without firemen, did you? A. We reached that conclusion based on our experience and the time that we put these rules in effect in 1956, up to 1959, when we ceased to hire firemen.

Q. Did you run trains without firemen prior to 1959? A. Yes. I think I have testified here—well, I will take that back. I have not testified. I will withdraw that. I have not testified. I am sure that we did. I say I am sure that we did, but I would have to check the records to determine that.

Q. You are not sure you did? A. I am not positive of that.

Q. If you did, did you do so deliberately?

Mr. Zorn: I object to that. Is this a period prior to 1959?

The Court: This is a period prior to '59, isn't it?

Mr. Kramer: Mr. Tolleson testified that he reached this conclusion that they didn't need firemen on the basis of running trains without firemen. He says he reached the conclusion in 1959.

238 The Court: He said also that the experience that he had from '59 on.

Mr. Kramer: If he reached the conclusion in '59, it couldn't be based on experience after '59.

The Court: That is right.

Mr. Kramer: And if he reached his conclusion in 1959, your Honor will recall that in the trial of the merits of this case the testimony was that they didn't start running trains without firemen until 1959.

Mr. Zorn: Your Honor, the witness has very clearly testified, and I don't know if Mr. Kramer heard him, that this question of running trains without firemen was a matter of continuous study at least as early as 1956, and the issue on the question, or the pending question, is simple: whether or not they ran trains without firemen prior to 1959.

Now you will recall that no matter how many instances there were, there were isolated instances of trains being run without firemen prior to 1959.

The Court: We will adjourn at this time for lunch.

Will you gentlemen come up?

(At the Bench:)

The Court: The Court is of the opinion that the record in this case would show that the great majority of
239 the firemen are also engineers.

Mr. Kramer: They are qualified as engineers, yes.

The Court: Yes. In other words, so that we don't have any testimony from any firemen. In other words, the testimony that we have heard is from men who are working as firemen but who are qualified as engineers also.

Mr. Kramer: Yes.

The Court: Now my own thought is that those men naturally in a cab of an engine are in an entirely different position than any new man hired as a fireman, because they already understand Diesels. That is, they understand, they are engineers. Do you follow me?

Mr. Kramer: Well—

The Court: They are not in the position of strictly a fireman. They have graduate into the engineer class.

Mr. Kramer: We couldn't possibly produce anyone who is a fireman and not an engineer today on the Southern, because—

The Court: You don't get my point. Mr. Tolleson, do you follow me, is saying, in other words this appears to me to be put into a vacuum, that if the man gets on the train as a fireman, that he is a fireman exclusively; when in reality that fireman is an engineer.

240 Mr. Kramer: That is right.

The Court: Do you follow me?

Mr. Kramer: Yes.

The Court: Now he may know a lot more about the engine. Certainly the engineer wouldn't let a new man touch anything in his engine. Do you get my point?

Mr. Kramer: Well there is no indication of that.

The Court: No. But I am talking about the fact that we are asking Mr. Tolleson all of the details, when in reality the man that is in the engine with him is an engineer.

Mr. Kramer: That is right.

The Court: Now he is not void of knowledge that the engineer would have.

Mr. Kramer: No.

The Court: Do you get my point?

Mr. Kramer: Yes, I understand that.

The Court: So that I don't know that it is of any real consequence, because if he works one run as an engineer and works the next run as a fireman he knows as much when he is a fireman as he did when he was an engineer.

Mr. Day: May I say this, your Honor. The purpose of those questions will show it is clear that the man who works as a fireman knows probably as much as those who
241 work as an engineer on an average today on the Southern Railway.

The problem important to our view of the case is that the engineer stays up there in the front in the cab

where he belongs and is obliged to stay. Yet the train is in motion while the the fireman goes back to do all of the adjusting and everything in order to keep the motors going. That is what we are shooting at.

The Court: My point is that there is no testimony in the case as to what training a fireman gets that would qualify him to go back and start fooling around with some gadgets on a Diesel.

Now the engineer may know something about the gadgets on a Diesel. Do you get my point?

Mr. Kramer: Yes, I understand.

The Court: So that there is a wide difference between two men, one working as a fireman, and yet they are both qualified as engineers.

Mr. Day: And a new fireman.

The Court: Because these three men who testified yesterday said they were firemen, and engineers.

Mr. Kramer: All of them, of course.

Mr. Zorn: Yes.

Mr. Kramer: I don't know if the original record is in evidence here or not. But the collective bargaining
242 agreement is in the record. It is assumed there that a fireman has to qualify as an engineer or he is dropped.

The Court: Or he is out.

Mr. Kramer: So after four years every fireman is an engineer or he is dropped. Since they have not hired any for four years we don't have any who are only firemen.

The Court: A new man getting new runs, what do you call it "cubbing"? He gets three runs and he gets on, and something happens to a Diesel.

Mr. Kramer: It depends on what happens, I guess.

The Court: I am not too sure the engineer would say "go back and fix it," because he is liable to fix the train for good.

We will adjourn now until two o'clock.

(Whereupon, at 12:52 o'clock p.m., a luncheon recess was taken until 2:00 o'clock p.m. of the same day, Friday, September 13, 1963.)

AFTERNOON SESSION
(2:00 p.m.)

The Court: You may proceed.

Mr. Kramer: Thank you, your Honor.

Cross-Examination—resumed

By Mr. Kramer:

Q. Mr. Tolleson, I asked you whether you had finally reached a conclusion in 1959 that a fireman was not necessary? A. We had by that time reached that conclusion.

Q. You had, did you say? A. Yes. As I said, we had been examining this certainly since 1956 when we changed our rule book, and we were, as we went along, of the opinion that by the time '59 came that we could operate our train safely and efficiently without firemen.

Q. Why did you not at that time issue the promulgation that you issued July 1, 1963? A. Because there was no real business reason to do it. We had these men that we were going to have to continue to keep on our seniority roster, continue to have to pay. We were not going to get rid of those firemen. So that there was no real pressing need that we change these rules. That didn't occur until we had to hire these new men.

244 Q. What was there about the necessity of hiring these new men that made it a sounder business judgment on July 1, 1963 than it would have been earlier? A. Because it was imperative that the fellows understand thoroughly then what was expected of them or not expected of them.

Q. Why didn't you limit the application of your old rules to the new rules? (sic) A. Because they were all firemen so far as we saw it, and we wanted the rules to apply certainly as to the lack of responsibility to all firemen.

Q. As I understand you, you thought between 1959 and 1963 since you had these men anyway, you may as well get

use from them? A. We couldn't get rid of them. They were doing no actual harm. We had to pay them.

Q. And you thought you might as well get something for what you were paying; is that right? A. Whatever they were able to produce that was of any benefit. Certainly there was no reason why we should change the rules at that time.

Q. Why did within two days after the effect of this Court's order it suddenly became useful (sic) to get something for the pay you were giving? A. It didn't be-
245 come necessary so far as that was concerned. We said that what they were doing could be done by the head brakeman and engineer.

Q. Why do you find it now a sound business judgment and not a sound business judgment earlier not to get something for the money you were paying? A. It is just a sound a business judgment in our opinion, or it was when we changed the rules, to require, to actually require no more of these new men than we would have of the old. There was no point of making fish of one and fowl of the other.

Q. Is there no point of getting something for your money? A. We certainly, so far as the need of the firemen are concerned, we don't think there is anything actually that they can produce for their money. But we are not permitted to get rid of them.

Q. Well, are they producing any less now than in 1959? A. They are not producing any more.

Q. Are they producing any less? A. I would say they are producing practically nil, or nothing.

246 Q. Well I thought you continued the old rule in effect after you concluded the firemen were useless to get something for your money. A. If I said it that way, I certainly didn't intend that they were performing any useful duty that we couldn't do without.

Q. Then, why did you not issue this prior to two days after the effective date of the Court's order? A. There was no pressing need to change the rules at that time.

Q. How did the pressing need arise on July first? A. Because we had some two hundred new men who had to be instructed what to do, if anything.

Q. And how many old firemen did you have at that time?

A. We had a great number. I don't recall the exact number.

Q. Is it about twelve hundred? A. Somewhere in that neighborhood, I would say.

Q. Wasn't it to make this Court's order look foolish? A. Indeed not, sir. We had no thought that we were making anything look foolish.

Q. In hiring these two hundred twenty-three men, why didn't you try to get the best men you could who
247 could perform some service? A. We didn't have the idea that they were going to perform any real service; that there was no real need for them.

Q. I am not talking about "need," Mr. Tolleson. I am talking about what they could do that would be useful, such as observing a passing signals? A. We didn't think that the firemen we had need be continued for that purpose, as I have testified. They had brakemen and the engineer who could take care of that situation very nicely.

Q. But so far as the firemen between 1959 and '63 did observe the signals, that was some contribution, was it not? A. I couldn't be too sure. It just depends on what the situation was, whether or not it was a contribution.

Q. In some situations would it be a contribution? A. I am not prepared to answer that. I wouldn't think so.

Q. Well, could the old firemen at least correct some malfunctions to at least keep the train running, could they not? A. Not in my opinion. We had to do certain things
248 about an engine to keep firemen, for instance sealing up the high voltage to keep them out because of the damage they might do for that matter.

Q. You did not seal the low voltage cabin, did you? A. No, so far as the low voltage is concerned, I don't think you know what you are talking about, really.

Q. Couldn't a fireman replace a fuse or correct a short circuit? A. Yes, and so could an engineer.

Q. The engineer would have to stop the train to do it?

A. He couldn't leave his post of duty while the train was in motion.

Q. And to stop the train, a long freight train to stock a fuse involves a loss of time and considerable expense, does it not? A. We don't consider it so, no.

Q. It cost something, doesn't it, Mr. Tolleson? A. Mr. Kramer, we have had many cases where firemen, many, many cases where we had to stop and have that done and had to get shop people to do it for that matter.

Q. But with a fireman, the necessity for stopping is less frequent, is it not? A. I don't think so.

Q. Well every time the engineer has to stop to correct a malfunction that could be corrected by someone
249 else without stopping, the fireman would be making the contribution, would he not? A. If the fireman did that, yes.

Q. Mr. Tolleson, you testified that you had frequently in the past changed your book of operating rules freely whenever you felt like it, is that correct? A. Whenever we felt that this was a necessity because of changing conditions, yes. Technological improvements and so forth.

Q. Have you ever in the past changed a book of operating rules to transfer functions performed by one craft represented or working under a collective bargaining agreement to members of another craft?

Mr. Zorn: Your Honor, you sustained an objection to my line of examination with respect to changes and the consequences of those changes and the examples of those changes. On the basis of your ruling, Mr. Kramer is now going into an area of examination from which I was precluded.

Mr. Kramer: Perhaps my position is misunderstood.

It is, that regardless of what they can do by way of changing the book of operating rules in this or that in-

stance, they cannot validly change the book of operating rules to create a condition in violation of statute, in violation of an agreement, or in violation of a Court
 250 order. That is the basis on which I objected to Mr. Tolleson's testifying on direct examination concerning the changes.

Whether they have that right or don't have that right, normally, they cannot exercise such right to negative a statute or an agreement or Court order. They cannot validly nor properly do that. Now they can put anything they want in their book—

The Court: What is your point?

Mr. Kramer: My point is that if they put in their book—

The Court: Aren't you questioning now the very thing you objected to?

Mr. Kramer: I don't think it is the very same thing I objected to, no. I am putting in evidence to corroborate my argument they cannot make a change in the book of operating rules to negative a requirement.

Mr. Zorn: I was foreclosed completely when I asked Mr. Tolleson about changes in operating rules which affected other crafts or eliminated duties or requirements, and I was foreclosed.

The Court: Yes.

Mr. Zorn: Now he wants to open up—

The Court: Now Mr. Kramer is opening the door.

251 Mr. Kramer: If your Honor thinks I am opening the door, I will open the door and withdraw the objection.

My position is, they can print any book they want. But the changes in it, if those changes violate a Court order or some other legal requirement, is ineffective.

The Court: Let's proceed. Go ahead.

Mr. Kramer: Read the last question, please.

(The Reporter read the last pending question.)

The Witness: I think, Mr. Kramer I can cite you two examples that involved elimination of people in one craft

on work that they had formerly been doing, by the publication of certain rules. Is that what you want, now?

By Mr. Kramer:

Q. I am not sure I know what you mean. Go ahead. A. Sir?

Q. I am not sure I know what you mean. Go ahead though. A. They issued a rule in 1955 whereby trains operating through a territory occupied by maintenance of way, gangs with on-track machinery would proceed without benefit of roadway flagmen; up until that time roadway flagmen had manually by flagging each side of the work protected that work and stopped trains.

252 Q. Now Mr. Tolleson, have you finished? A. Not quite. So that when we issued this rule, that automatically within itself cut someone, cut some one hundred maintenance and roadway flagmen out of jobs and out of so-called working conditions that they had previously enjoyed.

When we issued our book of rules in August of 1956, we embraced within those rules an entirely new concept of operation on Southern, known as "Centralized Traffic Control."

Centralized traffic control placed the movement of trains within the hands of one man—the train dispatcher. That resulted in the discontinuance of Southern's telegraphers, the jobs of telegraphers.

In the book of August first, 1956, we eliminated some seventy-five per cent of the duties of operators, because of technological improvements in communications and signaling that had transpired.

Those are changes that we made without consultation, without conferring with any legal organization or labor organization. Those were operational practices that we had never done other than make decisions of management

on.

Q. Those two instances are the only two you know of?

A. Those are three major instances, I would say.

Q. I heard you give two. A. No, sir.

253 Maintenance of ways— A. The C.T.C. or which is centralized traffic control. The other change was to eliminate many rules with respect to manual block. Manual block had been supplanted by automatic box signaling involving both automatic block signaling and remote control at that time.

Q. Let's take them in that order. You said you eliminated manual flagging by maintenance-way flagging; is that right? A. Right.

Q. Is somebody else in some other craft doing manual flagging for maintenance of way gang? A. No. These rules, actually, the thing that is doing it is done by the engineer of the train.

Q. The engineer is giving manual flags? A. He is not giving manual flags but he is accepting instructions over the radio that would have formerly been given to him by the man on the ground. So that certainly the working conditions and maintenance of way man were eliminated so far as that was concerned.

Q. Now Mr. Tolleson, you said the work of manual flagging was eliminated? A. By some one hundred people.

Q. By that do you mean nobody is doing the manual flagging? A. That is right.

254 Q. Now in connection with your manual blocks, when you eliminated the manual blocks and took that out of the craft of? A. We took it out of the craft of operators.

Q. Manual blocks, operators outside of the stations? A. The manual block was not taken out of the purview of operators. It was kept in some instances, signaling took the place of the manual block. That was, what I spoke of in respect of the modern signaling.

Now when I talked about centralized traffic control, the dispatcher took out of the hands of way-side operators and dispatchers and operators are two different crafts, as you know, they took it out of the hands of operators the operation of C.T.C.

Q. Let's consider— A. I mean not the operation of C.T.C. but the train orders that the operators formerly issued and were necessary under the old system of operation.

Q. Now in the case of manual block is anybody other than the operator now giving the manual block? A. In the case of the manual block, no. I pointed out that to show graphically that we do eliminate rules pertaining to the duties of an organization or craft without
255 conferring with them.

Q. Yes? A. So that, as you say,—I think you are striving to point out that there are two areas here, where certainly I pointed out in the C.T.C. operation and in the radio flagging concept that that was taken away from the craft.

Q. It was taken away because it ceased to exist; is that correct? The manual blocking? A. Let's not separate it now. I thought I had tried to explain to you that I was leaving manual block over here to the side. But the reason I brought out manual block was to here demonstrate that we had reduced those rules, and did in 1956 some seventy-five per cent. We did that without conferring with the labor organization.

Now true, that the rules that we left dealing with that type of operation would be handled by operators. So we did not take that duty away from them except—and give it to another craft, so to speak.

Now let's get to the two we are talking about.

Q. You brought in the third; I didn't. A. All right, sir. I am straightening that out, too.

The detail that I mentioned that involved changes where people of one craft were doing this work and in effect it was transferred to another craft, so to speak, was
256 that of radio flagging, any strange moving through territory occupied by maintenance of way equipment on the track, where manual flagging by men of the maintenance of way craft had been doing that flagging. That

rule was put into effect. Then the crews in dealing with the foreman over the radio, in effect moved through that territory under the protection of the rule that we set up to take care of it and it eliminated some one hundred maintenance of way flagmen.

Now the second case I talked about was the setting up of centralized traffic control operation. Now when that was put into effect, we did eliminate operators on line of road who previously had been handling train orders for trains, but were no longer necessary because the control of the signals was placed in the hands of the train dispatcher, so that he governed the movement of the trains by signal indication rather than issuing a train order through the operator to govern the movement of the trains. Those are the two areas I had in mind, sir.

Q. I thought we had disposed of the first one, but perhaps not; the manual flagging that the maintenance of way flagmen did is no longer done by anyone, is it? A. The method, that particular flagging is not done by anyone, no.

Q. There was nobody in some other craft to whom
257 the job of performing manual flagging is now done?

A. I would say that when the foreman by radio notifies this engineer that he can pass this positive stop sign and proceed through that territory, that that function took the place of those manual flagmen and transferred that phase of it, that flagging job, in effect, to those people.

Q. But when it was done it was not done by manual flagging, is it? A. No.

Q. Let's go to C.T.C.

Prior to C.T.C. train orders were sent to operators by telephone or telegraph, were they not? A. Right.

Q. The operator then wrote down the orders he got by telephone or telegraph from the dispatcher, did he not? A. That is right.

Q. When the train came by the operator delivered it to a member of the train crew, did he not? A. That is right.

Q. Is that still done at the places where you have eliminated the operators? A. No.

Q. There is nobody who is now doing the work of receiving, transcribing and delivering train orders that the
258 operators used to do at the places where the operator is eliminated? A. That work is done by the train dispatcher.

Q. Does the dispatcher send out and send to himself and then write down and deliver it to a train crew? A. His communication is a manipulation of that signal. So that is in effect the order that permits that train to operate.

Q. I am not talking about the effect, Mr. Tolleson. I am talking about the physical work formerly done by an operator which he is no longer doing.

Is that physical work, listening to, transcribing and delivering train orders now done by any one where the operators have been eliminated? A. No; it isn't necessary.

Q. Mr. Tolleson, I believe you testified that it is your belief that this question of firemen will be resolved by their elimination by attrition; is that correct? A. I would hope so.

Q. Is that your belief? A. I can't say that it is my belief. I can only say that I would hope that it might be settled that way.

Q. If on direct examination you so testified, you were in error; is that correct? If you testified that it was
259 your belief? A. Yes, if I testified that it was my belief I certainly did not intend to say that it was my belief that it would be settled that way. I can't predict what might happen on that, although I am permitted to believe such a thing would happen. I can't predict, as I say here now.

Q. Mr. Tolleson, I quite agree, you have a right to believe anything you believe and you can't be charged with anything because of what you believe.

But it is now your testimony that it is not your belief that the problem will be settled by attrition? A. No,

I think you are trying to—maybe I am getting a little bit twisted in what we are trying to arrive at.

I would hope that it would be settled that way. Certainly I cannot predict that it would be settled that way. And I think that I will go back to my original statement, that I would believe that it would be settled that way. I think that that is really what prompted us to get into this hiring of the older men, for that matter. We certainly did not want to be saddled with younger men on our payrolls if we were to get attrition.

Q. Is it now again your belief that it will be settled
260 that way? A. I can say that it is my personal belief, and as you said, I think I am entitled to believe as I wish.

Q. Now it is your belief that that is the way it will be settled, by agreement of these matters now pending before the National Mediation Board; is that what you said? A. Yes, I would say that I would believe that.

Q. Is it also your belief that you have a right to eliminate them by attrition without reaching an agreement on the matter now pending before the National Mediation Board? A. No. I have not said that.

Q. Well I am asking you whether that is your belief.
A. That we have the right to do that, without a final decision?

Q. Yes. A. Well I don't think that we have the right to do that. I don't think that we have that right.

Q. You do not believe you have the right to eliminate firemen by attrition unilaterally, just by firing? A. Let's put it this way: I don't believe, or we didn't believe that we had to hire firemen to fill these runs for which we didn't have firemen. That was our belief at that time.

Q. Will you distinguish that from eliminating fire-
261 men by attrition? A. Well in the broad sense of the term, if we didn't hire firemen then attrition would apply, of course.

Q. In what sense would it not? A. Well the sense in which it would not would be if we finally reached an agreement and we didn't get attrition, then we couldn't apply it.

Q. Mr. Tolleson, in issuing your new rules on July 1st, 1963, had you discussed the issuance of such rules with officials of other railroads? A. No, we did not.

Q. Do you know whether any other railroad has issued comparable rules? A. I had understood that probably one other railroad had eliminated some rules from their book. I have not actually seen them.

Q. Would that other railroad be the Florida East Coast? A. No, no, no. I didn't have the Florida East Coast in mind.

Mr. Zorn: May I object and move to strike the answer, your Honor. We are going into the practices of other railroads and we are certainly going far afield from the issue in front of this Court on a contempt proceeding.

262 Mr. Kramer: It certainly goes to the question of good faith, if the Southern Railway alone, among all the other railroads in this country think they can get away with something like that, I don't think they think they can get along with it honestly. They are the only one—

Mr. Zorn: I withdraw my objection.

The Court: All right.

By Mr. Kramer:

Q. You say you know of one other railroad which you think may have? A. I had understood that the C & O Railroad had changed its rule book sometime ago to eliminate certain duties of firemen. I have not seen that. The Chesapeake & Ohio.

Q. To eliminate certain duties? A. I would have to say "certain" because I have not seen the book itself. That is just an understanding that I got through—

Q. You think they eliminated, as you did, all the duties? A. I couldn't say.

Q. You know of no other railroads of comparable— A. I have not examined books of other railroads. I am just

not familiar with what other railroads have done.
 263 Q. Mr. Tolleson, in issuing your promulgation of July first, 1963, was that your idea? A. The changes in the rules?

Q. On July first, or effective July first, 1963? A. It was not my sole idea, no.

Q. Well, who initiated that in the Southern Railway? A. Our President.

Q. It was his idea? A. I said it wasn't my sole idea. I would say that it initiated with him, yes.

Q. He first suggested doing that? A. Yes.

Q. Then it was his idea; is that right? A. I would say that when it was finally done it was his idea. The matter of these requirements, as I have previously testified, were transitions over the years of experience that we had. The finality of the thing, when the rules were changed, when we hired these new men, was his decision.

Q. It was his decision? A. It was his final decision, yes.

Q. Who wrote them? A. Who wrote these rules? I wrote them.

Q. And you wrote them upon the President's decision that they be issued; is that correct? A. Yes.
 264

Q. And when did Mr. Brosnan first suggest that this be done? A. This was done at the time that we were required by the Court to hire new men.

Q. I left a gap. Mr. Brosnan is your President, is he not? A. That is correct.

Mr. Kramer: Plaintiff's one for identification, please.

The Deputy Clerk: Plaintiff's exhibit one for identification.

(Plaintiff's one was marked for identification.)

By Mr. Kramer:

Q. Mr. Tolleson, I hand you a document marked plaintiff's exhibit number one for identification, which appears to be a memorandum of agreement effective May sixth, 1946.

I ask you if that is an agreement entered into between the Southern Railway System and the Brotherhood of Firemen and Enginemen?

Mr. Lavinsky: Your Honor, could we have a moment to read this?

265 The Court: All right.

(There was a short pause in the proceedings.)

The Court: You may proceed, Mr. Kramer.

By Mr. Kramer:

Q. Can you identify that as an agreement entered into by the Southern Railway and the B.L.F. & E.? A. Yes sir, it is an agreement.

Mr. Kramer: I offer it in evidence.

Mr. Zorn: I have no idea what possible relevance a document dating back to May 1946 can possibly have in this particular contempt proceeding, dealing with an order issued by this order in May of 1963. We are going into ancient history here.

The Court: Is there an objection?

Mr. Zorn: There is an objection on the ground it is completely irrelevant.

The Court: The objection will be overruled.

The Deputy Clerk: Plaintiff's number one received in evidence.

(Plaintiff's Exhibit No. 1 was received in evidence.)

By Mr. Kramer:

Q. Mr. Tolleson, are you familiar with—I withdraw that.

266 Mr. Zorn: Would your Honor care to look at that?

The Court: You may proceed, Mr. Kramer.

Mr. Kramer: Mark this for identification as plaintiff's number two.

The Deputy Clerk: Plaintiff's exhibit number two for identification.

(Plaintiff's Exhibit Number 2 was marked for identification.)

By Mr. Kramer:

Q. Mr. Tolleson, I hand you a document marked Plaintiff's exhibit number two for identification and ask you whether that is a form used by the Southern Railway System in employing these new firemen recently, the new so-called firemen? A. This is the first time I have seen this particular document. I understand that this is the type of document that was used in employing these—

Mr. Zorn: We are perfectly willing to stipulate.

The Witness (continuing): —these new men.

Mr. Zorn: We are willing to stipulate that plaintiff's exhibit two for identification is a form prepared by Southern Railway System and required to be signed by all new hires, after the Court's order.

The Court: All right.

267 Mr. Kramer: No further cross-examination.

The Deputy Clerk: Plaintiff's exhibit number two in evidence by stipulation.

(Plaintiff's Exhibit No. 2 was admitted in evidence by stipulation.)

Mr. Zorn: Your Honor please, the issue of elimination of rules requiring duties of firemen on other railroads was raised during the course of the cross-examination, and Mr. Tolleson testified that he wasn't certain exactly what the change was that was made on Chesapeake & Ohio Railway.

I would like to ask my friends on the other side to stipulate that the yellow document that I have in my hand is the book of operating rules of the Chesapeake & Ohio Railroad dated March 31st, 1951; and a blue book in my hand are the book of operating rules of C & O Railroad issued in 1958; that in the 1951 Rules there are a series of duties which are set forth requiring performance of func-

tions for firemen; whereas in the 1958 there are absolutely no requirements for duties of firemen.

Mr. Kramer: Your Honor, I am willing to stipulate upon the basis of Mr. Zorn and Mr. Kramer telling me, so that these are authentic documents. I could not without
268 understanding that or studying them stipulate as to what they contain, as Mr. Zorn described their contents.

Mr. Zorn: Well, we could. But certainly he is entitled to examine them. If he is willing to stipulate as to authenticity and has brought this out and made it relevant, I would like to offer both of these documents in evidence at this point.

The Court: All right. They will speak for themselves.

Mr. Kramer: Yes.

Mr. Zorn: We will have it marked.

(Defendant's Exhibits Nos. 9 and 10 marked for identification.)

Mr. Zorn: Your Honor, I have referred to the yellow-covered book of operating rules of the Chesapeake & Ohio Railway Company, which according to its terms were made effective on March 31, 1959; and that has now been marked defendant's exhibit number 9 for identification.

The rules with respect to requirements for duties of firemen in that particular document are contained in Rules 1150 through 1155, at Pages 110 and 111 of defendant's exhibit 9 for identification.

I would like now to offer this document in evidence, your Honor.
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The Court: It will be received.

(Defendant's Exhibit No. 9 was received in evidence.)

Mr. Zorn: And the blue book which I had not designated being the book of rules of the Chesapeake & Ohio Railway Company, effective October 26, 1958, which has now been identified as defendant's exhibit 10 for identification. It eliminates and does not have within all of the operating

rules prescribed and set forth in that book any rules requiring duties of firemen.

I offer defendant's exhibit 10 for identification in evidence.

Mr. Kramer: I object, of course, to Mr. Zorn's characterization. I take it that is not evidence. I take it the books will speak for themselves.

Mr. Zorn: Naturally they will speak for themselves. When you read it you may find something, but I doubt it.

(Defendant's Exhibit No. 10 was received in evidence.)

Mr. Zorn: Just a couple of questions on redirect examination of Mr. Tolleson.

270 Redirect Examination

By Mr. Zorn:

Q. Mr. Tolleson, before management of Southern had reached a conclusion sometime prior to 1959 that the duties which had been required of firemen could be performed efficiently and safely and well by other employees such as the head engineer, by the head brakeman and the engineer, did your management, in reaching that conclusion, give full and careful consideration to the effect of that conclusion on the efficiency and safety of the operation of your railroad?

A. We did.

Q. And when you came as you described to revise your rules in 1963, that is defendant's exhibit number one, and rules effective July first, 1963, did your management give full and careful consideration to the effect of the elimination of the requirement of any duties of firemen on the safety and efficiency and proper running of your railroad?

A. They did.

Mr. Kramer: We are back again to the question of "need" of firemen which is irrelevant to this case.

The Court: The objection will be sustained.

Mr. Zorn: Thank you. That is all.

Mr. Kramer: I have a little more to ask.

The Court: All right.

271 Recross Examination

By Mr. Kramer:

Q. Mr. Tolleson, do you know whether they had issued instructions to their newly hired firemen not to do anything? A. I don't know anything about instructions the C & O issued.

Q. Do you know whether since the issuance of this book of operating rules of the C & O, which is in evidence as defendant's exhibit 10, the firemen on the C & O actually continue to do the things they did before this was issued?

A. I don't know what they were doing before or what they are doing now.

Q. You have no knowledge of what firemen do on the C & O., Mr. Tolleson? A. No.

Q. Do you know whether rules pertaining to firemen on the C & O have been issued in some other form? A. I don't know anything about the rules issued by the C & O to its firemen in any form.

Mr. Kramer: No further recross.

Mr. Zorn: I have nothing further of Mr. Tolleson.

The Court: You may step down.

(The witness was excused.)

272 Mr. Zorn: Your Honor, the defendants rest.

The Court: All right.

Mr. Kramer: I would like to recall Mr. McCollum.

Whereupon,

Ralph McCollum

was recalled as a rebuttal witness for and on behalf of Plaintiff and, having been previously duly sworn, was examined further and testified as follows:

Direct Examination

By Mr. Kramer:

Q. You have been previously sworn and testified in this case, Mr. McCollum? A. Yes.

The Court: You know your oath carries over to this testimony?

The Witness: Yes.

The Court: You may proceed.

By Mr. Kramer:

Q. Mr. McCollum, I show you a document which is in evidence as defendant's exhibit 2-B, and ask you if you are familiar with it? A. No.

Q. You have never seen it before? A. No.

273 Q. Does your Brotherhood have periodic payments that members pay to the Brotherhood? A. As dues?

Q. As dues. A. Yes.

Q. What are they called in your constitution? A. Assessments.

Q. Mr. McCollum, I show you a document marked, or admitted in evidence as plaintiff's exhibit number one. Are you familiar with that document? A. Yes.

Q. What is it? A. It is a collective bargaining agreement that was entered into by General Chairman L. B. Johnson and Assistant Vice President C. D. Mackey specifying the manner in which firemen would qualify for service on a diesel locomotive.

Q. What was the purpose of this document or agreement? A. That was written before I was elected General Chairman. But the purpose of it was that the Carrier was making men "cub". We have identified that word, have we not?

The Court: Yes.

The Witness (continued): Cub an extensive length of time, some of them thirty days or more, to qualify.

274 It was necessary to enter into an agreement as to the limits, for these men that qualified under that agreement had previously qualified for a steam engine, and in my own personal case, when I was required to "cub" under this agreement I had not only qualified previously as a fireman but had also worked as an engineer.

Mr. Zorn: On the basis of the stipulation, Paragraph 13,

I move to strike the entire testimony of this witness, because Paragraph 13 is a factual stipulation which says:

"Firemen hired prior to July 1959 usually made, without pay, not less than three trips and not more than twelve trips to learn the road or not less than three trips nor more than ten trips to learn the yard before being assigned as firemen.

"The men referred to in paragraph 7 did not make any such trips before being assigned nor did the men referred to in paragraph 5 and 6 make such trips at the times therein referred to or since then."

I point out to your Honor that any testimony with respect to "cubbing" in any form or assignments in any form made at any time historically or in the past, prior to July 1959, by our agreement has been eliminated from any oral testimony in this case.

275 Mr. Kramer: Paragraph 7 deals with firemen "newly hired" were required to do such cubbing and not required to prior to this year. This agreement does not refer to firemen newly hired. This refers to firemen already qualified on steam engines and qualified to become firemen on diesel engines.

The Court: The objection is overruled.

You may proceed.

By Mr. Kramer:

Q. What do you mean by qualifying these men to become diesel firemen? A. There is quite a difference in service performed by a fireman on a diesel and that on a steam engine as far as it related to the change in the type of motive power; but not as far as rules and so forth are concerned.

Mr. Zorn: Your Honor, you understand I have my same basic objection to this entire line as being completely irrelevant?

The Court: You have; yes.

By Mr. Kramer:

Q. In your experience as a fireman and as an engineer,
how long after a fireman first performs compensated serv-
ice is it before he can perform the functions you de-
276 scribed that he performed? A. State that again,
please.

Mr. Kramer: I withdraw the question. I will bring in
this evidence through another witness.

No further questions.

Mr. Zorn: No questions.

• • • • •
277 Mr. Zorn: Your Honor, at this point I should like
to move to dismiss this criminal-civil contempt pro-
ceeding on the basis of the entire record. I assume of
course that you will want to take that motion under
advisement.
• • • • •

EXHIBITS

Defendants' Exhibit 1

SOUTHERN RAILWAY SYSTEM
Office of Vice President, Operations

Washington, D. C., July 1, 1963

Effective this date, the following changes and deletions are made in BOOK OF SOUTHERN RAILWAY SYSTEM OPERATING RULES, EFFECTIVE AUGUST 1, 1956:

RULE 2, 1st Paragraph, Page 11.

2. Watches which have been examined and certified to by a designated inspector must be used by train dispatchers, conductors, enginemen, trainmen, hostlers, yardmasters, yardmen, switch tenders, operators, levermen, maintenance of way foremen, bridge foremen, signal and telephone maintainers, operators of track cars, and such other employees as may be designated.

RULE 3, 1st Paragraph, Page 11.

3. Unless otherwise provided, conductors, enginemen and pilots and others who have access to a standard clock must compare time before commencing each day's work. The time when watches are compared must be registered on a prescribed form. Conductor must compare time with engineman and trainmen, and engineman with conductor, before commencing day's work or starting on trip, if practicable.

RULE 99, 5th Paragraph, Page 33.

The front of the train must be protected immediately in the same way when necessary by the forward trainman, or other competent employee.

RULE 104, last Paragraph, Page 37.

Enginemen must see that switches and derails within view from their position on the engine are properly lined.

RULE 204, 3rd and 4th Paragraphs, Page 42.

Enginemen must show train orders and clearance cards, when practicable, to forward trainmen. Conductors must show train orders and clearance cards, when practicable, to trainmen.

Trainmen will keep orders in mind and, should conditions require, call attention of conductors and enginemen to their contents.

RULE 211, (b) last Paragraph, Page 46.

Clearance Form 603 must be delivered together with all train orders to each person addressed. Conductors and enginemen (or pilot) must, and when practicable trainmen will, see that the information shown on Clearance Form 603 corresponds with the train orders received.

RULE 404, Page 99, deleted.

RULE 707, 2nd Paragraph, Page 115.

Trainmen, hostlers and yardmen must observe all bulletins.

RULE 1003, Page 132.

1003. They are responsible for proper performance and handling of the engine, for care of equipment and economical use of fuel and supplies.

RULE 1005, Page 132.

1005. They must not receive information from flagmen until train is stopped. Work train flagmen are required to present Form 895 or 896.

RULE 1028, Page 135.

1028. They must not leave the engine cab while their train is in motion. When the train is stopped they may leave the engine cab only when brakes have been properly applied to prevent the train moving away. They must not leave their engine while on the main track, except to perform duties required by the rules.

RULE 1029, Page 135, deleted.***RULE 1050, Page 136.***

1050. Firemen are directly responsible to and must obey the orders of division and terminal officers. They must obey the orders of the shop foreman within shop limits, and in passenger service they must obey the orders of the engine-man.

RULE 1051, Page 136, deleted.***RULE 1052, Page 136.***

1052. They must report for duty at the appointed time and place.

RULE 1053, Page 136, deleted.***RULE 1054, Page 136.***

1054. They must not move the engine except on instructions of proper authority.

RULE 1056, Page 136.

1056. In passenger service, at initial terminals they must start steam generators and be prepared to turn steam to the train when called for. At final terminals, they must shut down steam generators, unless otherwise instructed by proper authority.

Stickers covering these changes will be distributed, and should be affixed in the proper place in the BOOK OF OPERATING RULES.

J. A. RUST,
Vice President.

STANDARD TIME

1. Standard Time obtained from an authorized observatory will be transmitted from designated offices at twelve o'clock, noon, Eastern Time, and eleven A.M., Central Time, daily, except Sunday.

2. Watches which have been examined and certified to by a designated inspector must be used by train dispatchers, conductors, enginemen, trainmen, hostlers, yardmasters, yardmen, switch tenders, operators, levermen, maintenance of way foremen, bridge foremen, signal and telephone maintainers, operators of track cars, and such other employees as may be designated.

The certificate in prescribed form must be renewed between the first and fifteenth days of each February and August, and filed with superintendent, except that signal maintainers may file their certificates with signal and electrical superintendent and telephone maintainers may file their certificate with the superintendent communications.

3. Unless otherwise provided, conductors, enginemen and pilots and others who have access to a standard clock must compare time before commencing each day's work. The time when watches are compared must be registered on a prescribed form. Conductor must compare time with engineman and trainmen, and engineman with conductor before commencing day's work or starting on trip, if practicable.

The location of standard clocks will be shown in the time table.

Conductors and enginemen who do not have access to a standard clock must compare time with each other before commencing each day's work and, when practicable, with conductors and enginemen who have standard time and have registered, or with

99. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must drop lighted fuses at proper intervals and take such other action as may be necessary to insure full protection.

When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes on rail 100 feet apart and, when necessary, in addition, displaying lighted fusees.

When a train stops under circumstances in which it may be overtaken by another train, the engineman will immediately signal the flagman to protect the rear.

When ready to proceed the engineman will recall the flagman and, when safety to the train will permit, he may return, leaving the torpedoes and a lighted fusee.

The front of the train must be protected immediately in the same way when necessary by the forward trainman, or other competent employee.

Within signalled territory, protection against following trains on the same track will have been complied with when flagman goes back a sufficient distance to insure full protection against trains moving at restricted speed.

When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

Enginemen must see that switches and derails within view from their position on the engine are properly lined.

104(a). When a train is in siding to meet another train, main track switch must be lined and locked for main track movement. Member of crew will not go nearer to the main track switch than clearance point until the opposing train has passed over the switch.

After lining a main track switch for a train or engine to make a movement facing the switch points, the employee tending the switch must take a position not less than 20 feet from the switch stand.

204. Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, also to anyone who acts as its pilot. A copy for each employee addressed must be supplied by the operator.

Orders addressed to operators restricting the movement of trains must be respected by conductors and enginemen the same as if addressed to them.

Enginemen must show train orders and clearance cards, when practicable, to forward trainmen. Conductors must show train orders and clearance cards, when practicable, to trainmen.

Trainmen will keep orders in mind and, should conditions require, call attention of conductors and enginemen to their contents.

Clearance Form 603 must be delivered together with all train orders to each person addressed. Conductors, enginemen (or pilot) must, and when practicable trainmen will, see that the information shown on Clearance Form 603 corresponds with the train orders received.

212. When so directed by the train dispatcher, a train order, having been transmitted, may be ac-

404. Deleted.

707. Bulletins will be numbered consecutively on each division, beginning with January 1 of each year, and will be posted at each bulletin station. They will be issued and cancelled by the proper officer. Conductors and enginemen must record name and date they have read and understand bulletins posted. They will be held responsible for compliance with instructions posted.

Trainmen, hostlers and yardmen must observe all bulletins.

Employees in charge of bulletin books must post bulletins and special instructions noted to bulletin books as received, noting the date and hour posted.

Bulletin books must not be used to post unofficial notices.

The location of bulletin books will be designated by time table.

1003. They are responsible for proper performance and handling of the engine, for care of equipment and economical use of fuel and supplies.

flagmen until train is stopped. Work train flagmen are required to present Form 895 or 896.

1006. When there is no conductor, or when the conductor is disabled, the engineman will act as conductor.

1028. They must not leave the engine cab while their train is in motion. When the train is stopped they may leave the engine cab only when brakes have been properly applied to prevent the train moving away. They must not leave their engine while on the main track, except to perform duties required by the rules.

1029. Deleted.

tion must be held in depressed position only with the engineman's foot.

1034. At the completion of the run they must deliver the engine at the designated place. They must make prescribed inspection and proper report of its condition.

1035. Enginemen notified by radio communication of hot boxes or other defects in their train must by radio promptly acknowledge such notification and stop train immediately for inspection.

FIREMEN

1050. Firemen are directly responsible to and must obey the orders of division and terminal officers. They must obey the orders of the shop foreman within shop limits, and in passenger service they must obey the orders of the engineman.

1051. Deleted.

1052. They must report for duty at the appointed time and place.

1053. Deleted.

1054. They must not move the engine except on instructions of proper authority.

1055. Steam generators on diesel units must not be blown down in the vicinity of passenger stations or at other locations where it would be hazardous or cause personal injury.

1056. In passenger service, at initial terminals they must start steam generators and be prepared to turn steam to the train when called for. At final terminals, they must shut down steam generators, unless otherwise instructed by proper authority.

Defendants' Exhibit 2B

**BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN**

Cleveland 15, Ohio

R. B. BRYANT, General Sec'y. & Treas.

August 9, 1963

Mr. J. H. Porter M-426
712 Avenue "F"
Lipscomb, Alabama

Dear Sir and Brother:

This will acknowledge your application for admission or readmission to membership in the Brotherhood of Locomotive Firemen and Enginemen as a non-insured member. The application has been accepted and your name placed on the Grand Lodge records as a member of Lodge 426 effective August 9, 1963. You will be liable for assessments beginning with the month of September, and these should be paid on or before the first day of each month to the Financial Secretary of your lodge, whose name and address is

R. E. Sligh
808 Hillcrest Rd.
Birmingham 15, Alabama

You will earn a fortune between your first and last paychecks. Part of everything you earn should be yours to keep. The difficulty lies in saving it and keeping it saved.

You can save on the installment plan to buy a definite sum of money for future delivery—whenever you need it most. All that will be there when you get there is what you send ahead. It will be to your everlasting benefit for you to investigate the provisions of our Retirement Income Plan of Insurance.

Additional information on insurance may be obtained by contacting your local lodge insurance representative, or you may write direct to me and every assistance possible will be rendered.

Commending you upon joining the ranks of the Brotherhood, I am, with kindest regards and best wishes,

Yours fraternally,

/s/ R. R. Bryant

P.S. Please furnish your full given name for our records. Members sixty years of age or over are not eligible to participate in the Beneficiary Insurance Department.

Defendants' Exhibit 3

WAGE ASSIGNMENT

H. W. Lockett

Bo 426

420-05-8906

Org 315

(Name—Print)

(Social Security No.)

933-47th Way South

Birmingham

(Street address, City and State)

(Work Location)

Auditor of Payrolls,
Southern Railway System,
99 Spring Street, S. W.,
Atlanta 3, Georgia

I hereby assign to the BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN that part of my wages necessary to pay "any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership" in the BROTHERHOOD, as reported each

month by the designated representative of the BROTHERHOOD in accordance with provisions of the agreement dated March 3, 1959; and I authorize you to deduct such sum from my wages and pay it over to the BROTHERHOOD as provided in that agreement. This wage assignment will remain in effect until revoked by me, unless it is automatically terminated as hereinafter provided.

I understand that this wage assignment cannot be revoked for one year from the date of its execution, that at any time after such date I may revoke this assignment by properly executing a REVOCATION OF WAGE ASSIGNMENT form as provided for in the agreement, and that such revocation will be effective after the BROTHERHOOD has furnished such form to you.

I also understand that this wage assignment will terminate automatically upon termination of the agreement dated March 3, 1959, or in the event a labor organization other than the BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN is certified as the designated and authorized representative of employees in the craft or class in which I am employed.

8-23-63

(Date of Execution)

H. W. Lockett

(Signature)

Defendants' Exhibit 4

THROUGH FREIGHT, MIXED, HELPER
 (Add 13c for 2nd Dist. CNO&TP Firemen)

FIREMEN				ENGINEERS			
Wt.	Day	Hour	1½	Day	Hour	1½	
0-140	18.56	2.32	3.48	21.79	2.73	4.09	
140-200	18.91	2.37	3.55	22.22	2.78	4.17	
200-250	19.08	2.39	3.58	22.39	2.80	4.20	
250-300	19.25	2.41	3.61	22.54	2.82	4.23	
300-350	19.52	2.44	3.66	22.69	2.84	4.26	
350-400	19.60	2.45	3.68	22.80	2.86	4.30	
400-450	19.76	2.47	3.71	23.11	2.89	4.34	
450-500	19.92	2.49	3.74	23.32	2.92	4.37	
500-550	20.08	2.51	3.77	23.58	2.94	4.41	
550-600	20.24	2.53	3.80	23.71	2.97	4.45	
600-650	20.40	2.55	3.83	23.86	2.99	4.48	
650-700	20.56	2.57	3.86	24.07	3.01	4.52	
700-750	20.72	2.59	3.89	24.25	3.03	4.55	
750-800	20.88	2.61	3.92	24.43	3.06	4.58	
800-850	21.04	2.63	3.95	24.61	3.08	4.62	
850-900	21.20	2.65	3.98	24.79	3.10	4.65	
900-950	21.36	2.67	4.01	24.97	3.12	4.68	
950-1000	21.52	2.69	4.04	25.15	3.15	4.72	
1000-1050	21.68	2.71	4.07	25.33	3.17	4.75	
1050-1100	21.84	2.73	4.10	25.51	3.19	4.79	
1100-1150	22.00	2.75	4.13	25.69	3.21	4.82	
1150-1200	22.16	2.77	4.16	25.87	3.24	4.85	
1200-1250	22.32	2.79	4.19	26.05	3.26	4.89	
1250-1300	22.48	2.81	4.22	26.23	3.28	4.92	
1300-1350	22.64	2.83	4.25	26.41	3.30	4.95	
1350-1400	22.80	2.85	4.28	26.59	3.33	4.99	
1400-1450	22.96	2.87	4.31	26.77	3.35	5.02	
1450-1500	23.12	2.89	4.34	26.95	3.37	5.06	

The above rates apply to Mine Run Service on NO&NE. Daily Mine Run Guarantee—Firemen—\$20.44, Engineers \$23.30.

Deadhead mileage rates in CNO&TP Firemen's Schedule 17.74 cents per mile and 18.34 cents per mile, respectively.

LOCAL FREIGHT, WORK, CONSTRUCTION, WRECKING SERVICE
 (Add 13c for 2nd Dist. CNO&TP Firemen)

FIREMEN				ENGINEERS			
Wt.	Day	Hour	1½	Day	Hour	1½	
0-140	18.96	2.37	3.56	22.25	2.80	4.19	
140-200	19.31	2.43	3.63	22.78	2.85	4.27	
200-250	19.48	2.44	3.65	22.95	2.87	4.31	
250-300	19.65	2.46	3.68	23.10	2.89	4.33	
300-350	19.92	2.49	3.74	23.25	2.91	4.36	
350-400	20.00	2.50	3.75	23.46	2.93	4.40	
400-450	20.16	2.52	3.78	23.67	2.96	4.44	
450-500	20.32	2.54	3.81	23.88	2.99	4.48	
500-550	20.48	2.56	3.84	24.09	3.01	4.52	
550-600	20.64	2.58	3.87	24.27	3.04	4.55	
600-650	20.80	2.60	3.90	24.45	3.06	4.59	
650-700	20.96	2.62	3.93	24.63	3.08	4.62	
700-750	21.12	2.64	3.96	24.81	3.10	4.65	
750-800	21.28	2.66	3.99	24.99	3.13	4.69	
800-850	21.44	2.68	4.02	25.17	3.15	4.72	
850-900	21.60	2.70	4.05	25.35	3.17	4.76	
900-950	21.76	2.72	4.08	25.53	3.19	4.79	
950-1000	21.92	2.74	4.11	25.71	3.22	4.83	
1000-1050	22.08	2.76	4.14	25.89	3.24	4.86	
1050-1100	22.24	2.78	4.17	26.07	3.26	4.89	
1100-1150	22.40	2.80	4.20	26.25	3.28	4.92	
1150-1200	22.56	2.82	4.23	26.43	3.31	4.96	
1200-1250	22.72	2.84	4.26	26.61	3.33	4.99	
1250-1300	22.88	2.86	4.29	26.79	3.35	5.03	
1300-1350	23.04	2.88	4.32	26.97	3.37	5.06	
1350-1400	23.20	2.90	4.35	27.15	3.40	5.09	
1400-1450	23.36	2.92	4.38	27.33	3.43	5.13	
1450-1500	23.52	2.94	4.41	27.51	3.44	5.16	

The above rates apply to: Helper Switcher Service on Southern Railway and Mine Run Service on Sou., CNO&TP & AGS.

Daily Guarantee

Mine Run Service—Fire. 20.44; Engr. 23.30
 Wrecking Service—Fire. 20.44; Engr. 23.30



Defendants' Exhibit 6

SOUTHERN RAILWAY SYSTEM

Southern Railway Company
 The Cincinnati, New Orleans & Texas Pacific Railway
 Company
 The Alabama Great Southern Railroad Company
 Georgia Southern & Florida Railway Company
 New Orleans and Northeastern Railroad Company
 Harriman & Northeastern Railroad Company

BOOK OF OPERATING RULES

Effective April 1, 1943

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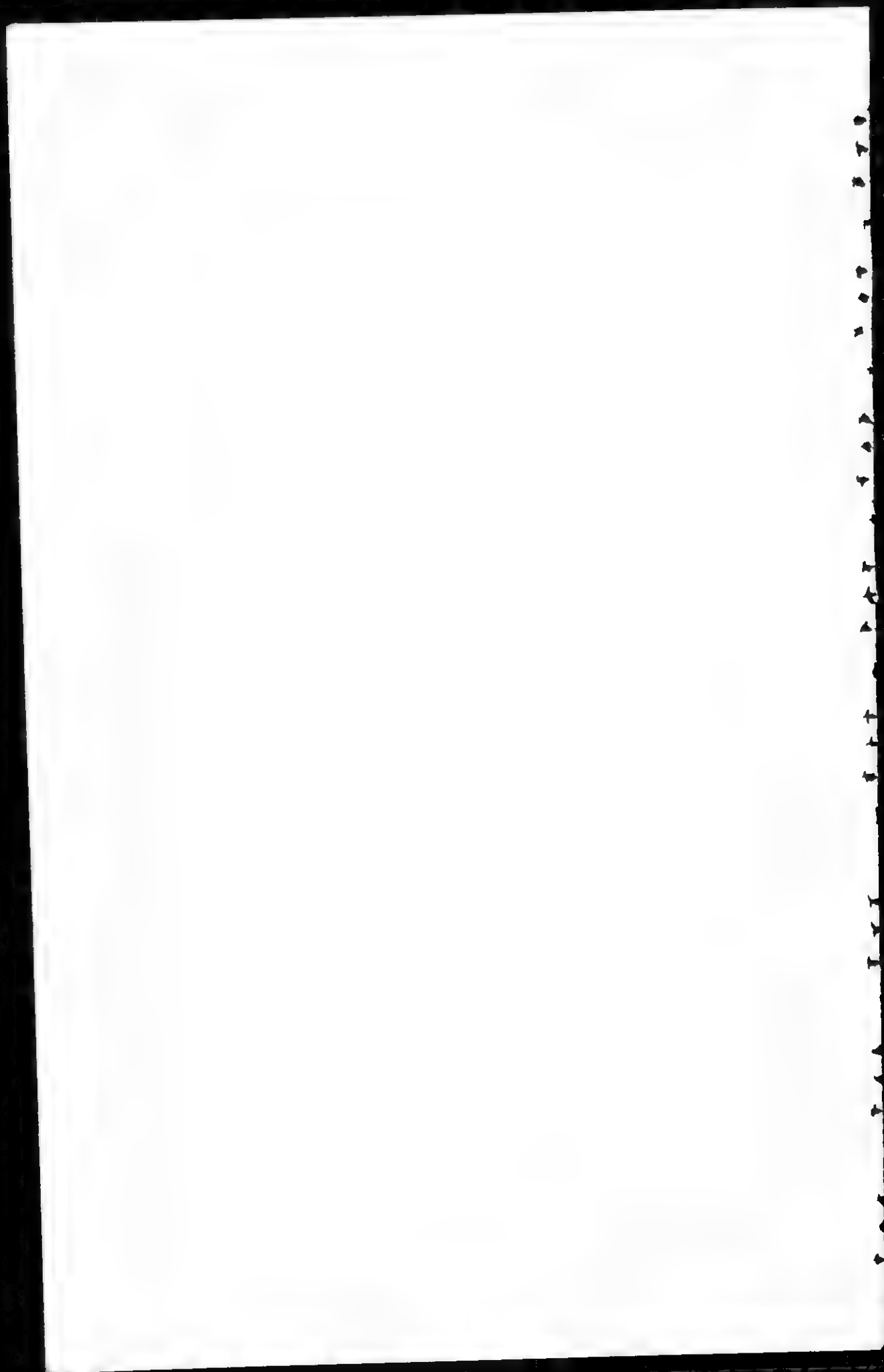
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108(a). A train holding train order form "Y" must not proceed beyond the conditional stop sign at the point designated in the order until notified by radio communication or in person by the MofW foreman named therein that the track is clear. When this notice has been so given the train may proceed on its rights to do so under governing rules and other train orders it may hold.

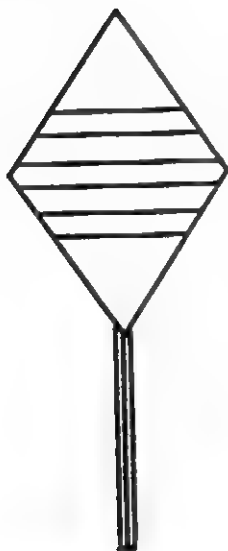
S.

Providing for a Movement When Automatic Block Signals are Inoperative

- (1.) *Automatic block signals between.....
and.....(if on double track add
.....bound track) displaying "Stop"*



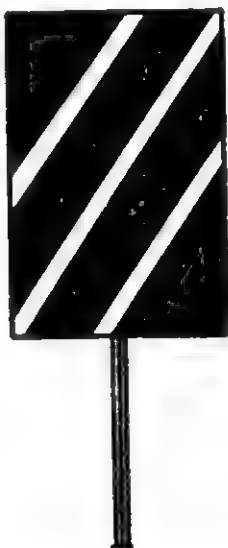
679a



**INDICATION—REDUCE SPEED PREPARED TO STOP
SHORT OF CONDITIONAL STOP SIGN**

NAME—APPROACH PREPARED TO STOP SIGN

This sign is to be displayed not less than
1½ miles in advance of conditional stop sign.



**INDICATION—STOP UNLESS NOTIFIED BY RADIO
COMMUNICATION OR IN PERSON BY
MoTW FOREMAN NAMED IN TRAIN
ORDER THAT TRACK IS CLEAR**

NAME—CONDITIONAL STOP SIGN

81a

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from the original bound volume

681a

MANUAL BLOCK SYSTEM

(Will be operative on divisions of subdivisions designated on the time-table or by special instructions.)

The indications are given by the position of the arms, by lights of prescribed color, or by both.

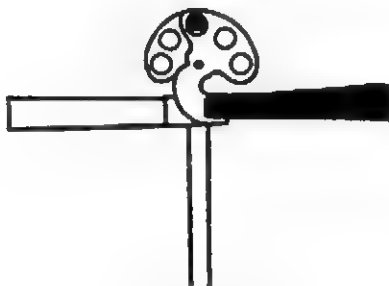
Semaphore arms that govern are displayed to the right of the signal mast as viewed from an approaching train.

THREE-POSITION BLOCK SIGNALS

(Used as Joint Train Order and Block Signals as prescribed by Rule 309).

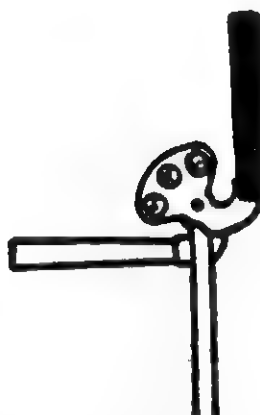
The following signals will appear where conditions require their use:

301(a)



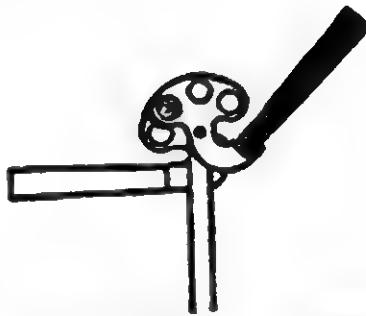
INDICATION—STOP
NAME—STOP SIGNAL

301(b)



INDICATION—PROCEED
NAME—PROCEED SIGNAL

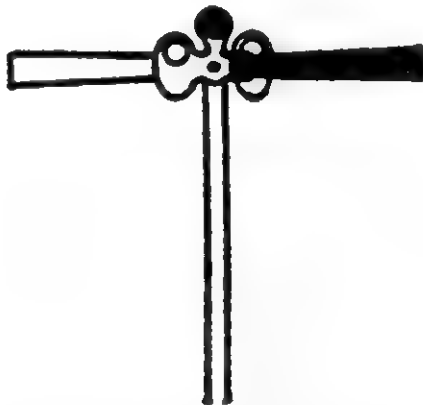
301(c)



INDICATION—BLOCK OCCUPIED; PROCEED PREPARED TO
STOP SHORT OF TRAIN AHEAD
NAME—PERMISSIVE SIGNAL

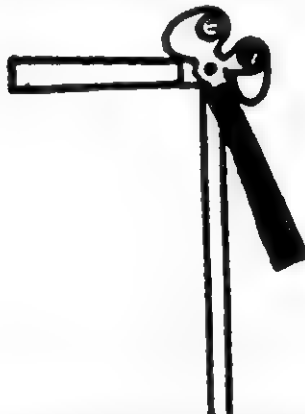
TWO-POSITION BLOCK SIGNALS
(Used as Joint Train Order and Block Signals as
prescribed by Rule 309).

302(a)



INDICATION—STOP
NAME—STOP SIGNAL

302(b)



INDICATION—PROCEED
NAME—PROCEED SIGNAL

305. Block signals govern the use of the blocks, but, unless otherwise provided, do not supersede the superiority of trains; nor dispense with the use or the observance of other signals whenever and wherever they may be required.

306. When a block station is open at an irregular hour, trains must be notified when possible by train order.

307. A train having entered a block on other than a Proceed-indication must not accept Proceed-indication at any intermediate block station which was closed when such train entered the block, without receiving Clearance Form 603.

308. When Clearance Form 603 is used information will be shown as to condition of block, "Clear" or "Occupied". If block is occupied, train will proceed prepared to stop short of train ahead.

309. Train-order signals, unless otherwise provided, will also be used as block signals and when so jointly used the rules governing the use of train-order signals must be observed.

OPERATORS

311. Signals must be kept in the position displaying the most restrictive indication, except when displayed for an immediate movement.

312. Appliances must be operated carefully and only by those charged with that duty. If any irregularity affecting their operation is detected the signals must be displayed to give their most restrictive indication until repairs are made.

313. Operators must observe, as far as practicable, whether the indications of the signals correspond with the positions of the levers.

314. Operators must not make nor permit any unauthorized repairs, alterations or additions to the apparatus.

92

Any defects in the appliances must be promptly reported to the chief dispatcher.

315. A block record must be kept at each block station on the prescribed form, beginning at 12:01 a.m., daily, showing the time all trains enter and clear the block, communicating code signals, and the time they are given and received.

316.

COMMUNICATING CODE:

1.—Keep block signal in stop position for opposing train.

13.—I understand.

2.—Block clear.

5.—Block not clear of train other than passenger.

56.—Block not clear of passenger train.

8.—Opening block station. Answer by 2, 5 or 56.

9.—Closing block station, followed by 2.

If the block is clear, to be answered by 13, followed by 2. If the block is not clear, to be answered by 5 or 56.

When two or more tracks are used in the same direction, operators in using the communicating code must also specify the track.

Note:—When telephone is used, the code will be used without the numerals.

317. On single track, to admit a train to a block, the operator must examine the block record and, if the block is clear of opposing trains and preceding passenger trains, give "1 for", to the next block station in advance. If it is proper for the train to be admitted, the operator in advance will reply: "2 for " or "5 of". The operator at the entrance of

the block must then display the proper signal indication.

A train must not be admitted to a block which is occupied by an opposing train or by a passenger train, except as provided in Rule 333 or by train order. A train may be permitted to follow a train other than a passenger train

93

into a block under Permissive-indication or Clearance Form 603, when so directed by train dispatcher.

318. On two or more tracks, to admit a train to a block, the operator must examine the block record and display proper signal indication.

A train must not be admitted to a block which is occupied by a passenger train, except as provided in Rule 333 or by train order. A train may be permitted to follow a train other than a passenger train into a block under Permissive-indication or Clearance Form 603.

319. When a train enters a block, the operator must give train number and time to the next block station in advance. When the rear of the train has passed 300 feet beyond the block signal, he must give the record of the train to the next block station in the rear. This information must be entered on the block records.

320. Unless otherwise provided, operators must not ask for the block until they have received a report of the train from the next block station in the rear.

321. Operators must, as far as practicable, observe all passing trains and note whether they are complete and in order, and the markers properly displayed.

322. Should a train pass a block station with any indication of conditions endangering the train, or a train on another track, the operator must immediately notify the operator at the next block station in advance, and each must display Stop-indications to all trains that may be affected, and must not permit any train to proceed until it is known that its track is not obstructed.

325. An operator informed of any obstruction in a block must immediately notify the operator at the other end of the block and each must display Stop-indications to all trains that may be affected, and must not permit any

train to proceed until it is known that its track is not obstructed.

326. When a train or engine takes a siding or otherwise clears the main track the operator must know that it is clear of the block before giving "2" or displaying a Proceed-indication for that block.

The operator must obtain control of the block before permitting a train or engine to re-enter the block.

327. To permit a train or engine to enter a block or foul the main track, or to cross from one main track to another, the operator must examine the block record and if all the blocks affected are clear of approaching trains he must provide or arrange for block protection before permission is given, and until movement is complete and block clear, trains will not be admitted to the block, except by "Permissive" signal indication or Clearance Form 603.

All cross-over movements must be entered on the block record.

328. When coupled trains are separated, as prescribed by Rule 364, the operator must regard each portion as an independent train.

329. When necessary to stop a train for which other than a Stop-indication has been displayed and accepted, the operator must give hand signals in addition to displaying the Stop-indication.

333. When, from any cause, an operator is unable to communicate with the next block station in advance, he must stop all trains approaching in that direction. Should no cause for detaining a train be known, it may then be

permitted to proceed with Clearance Form 603, provided ten minutes have elapsed since the passage of the last preceding train.

334. Hand signals must not be used when the proper indication can be displayed by the block signals, except as prescribed by Rule 329 or 343. When hand signals are

95

necessary they must be given from such a place and in such a way that there can be no misunderstanding on the part of engine men or trainmen as to the signals, or as to the train or engine for which they are intended.

Note:—Hand signaling includes the use of flag, lamp, torpedo and fusee signals.

335. Block signals for a track apply only to trains moving with the current of traffic on that track. Operators will use train order or home signal or both for blocking trains moving against the current of traffic.

336. Operators are responsible for the care of the block station, lamps, and supplies, and, unless otherwise provided, of the signal apparatus.

337. Lights in block stations must be so placed that they cannot be seen from approaching trains.

339. If a Stop-indication is disregarded, the fact must be reported to the next block station in advance and then to the train dispatcher.

340. To open a block station the operator must restore block signals to "Stop" position, give 8 to the next block station in each direction and record the trains that are in the extended block.

When trains, which were in the extended block when the block station was opened and which had passed his block station before it was opened, clear the block in advance he must repeat the record to the block station in the rear.

341. A block station must not be closed except upon authority of the train dispatcher.

342. Unless otherwise provided, a block station must not be closed until the block in each direction is clear of all trains.

To close a block station, the operator must give 9 followed by 2, to the next block station in each direction and

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when he receives 13 followed by 2, enter it on his block records, with the time it is received from each block station.

The Block signals must then be secured in the "Proceed" position, all lights, including train-order signal, extinguished, and the block wires and, when necessary, circuits arranged to work through the closed block station.

343. When a block station is open at an irregular hour, operators must use hand signals, in addition to block signals, to give the required indications until all trains have passed which have not been notified by train order that the block station is open.

343(a). When weather conditions obscure the view, operators will promptly report to the train dispatcher, who will decide if an absolute block of all trains must be maintained.

344. Operators must not permit unauthorized persons to enter the block station.

ENGINE AND TRAIN CREWS

361. Block signals for a track apply only to trains moving with the current of traffic on that track.

Train-order or home signal will be used for blocking trains moving against the current of traffic.

362. Trains must not pass a Stop-indication without receiving Clearance Form 603.

363. Trains must not proceed on hand signals as against block signals.

364. Unless otherwise directed, when two or more trains have been coupled and so move past any block station, they must be separated only at a block station and the operator notified.

365. When a train or engine takes a siding or otherwise clears the main track, unless the switch involved is oper-

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ated by the operator, conductor or engineman must so report to the operator. A train or engine must not enter a block or foul the main track, or cross from one main track to another, without permission of the operator.

A train or engine having passed beyond the limits of a block must not back into that block without permission of the operator.

370. When there is an obstruction between block stations, notice must be given to the nearest operator.

371. When a train is stopped by a home or block signal, the conductor or engineman must, when practicable, immediately ascertain the cause.

372. Conductors must report to chief dispatcher any unusual detention at block stations.

373. A block station must not be considered as closed, except as provided for by time-table or special instructions.

ISSUANCE OF CLEARANCE CARDS BY TELEPHONE AT

SIDING BETWEEN BLOCK STATIONS

380. The superintendent may authorize the meeting or passing of trains at intermediate sidings by train orders, copies of which must be given to the operators at first block offices on each side of the siding. The trains must

be stopped and orders compared with those held by conductor before allowing them to enter block.

381. The conductor of the train to take siding must report clear of main track to the next operator in each direction before the opposing train or trains are permitted to enter the block.

382. The train on the siding must not occupy the main track until conductor has properly received telephone block clearance card, Form 886, from the operator in advance.

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383. In transmitting or repeating a telephone block clearance card by telephone all stations and numerals must first be plainly pronounced and then spelled letter by letter, thus: Rockfish, R-o-c-k-f-i-s-h, and One Naught Five, O-n-e N-a-u-g-h-t F-i-v-e.

99

Defendants' Exhibit No. 7

SOUTHERN RAILWAY SYSTEM

Southern Railway Company

The Cincinnati, New Orleans & Texas Pacific Railway
Company

The Alabama Great Southern Railroad Company

Georgia Southern & Florida Railway Company

New Orleans and Northeastern Railroad Company

Harriman & Northeastern Railroad Company

OPERATING RULES

Effective August 1, 1956

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SOUTHERN RAILWAY SYSTEM

Southern Railway Company

The Cincinnati, New Orleans & Texas Pacific Railway
Company

The Alabama Great Southern Railroad Company

George Southern & Florida Railway Company

New Orleans and Northeastern Railroad Company

Harriman & Northeastern Railroad Company

The rules herein set forth govern the operation on the
railways shown above. They take effect August 1, 1956,

superseding all previous rules and instructions inconsistent therewith.

Special instructions may be issued by proper authority.

Whenever and wherever the word "Railway" is used in these rules, it is intended to cover any railroad or railway company shown above, or any subsidiary line, the management of which may, by proper order, make the rules effective thereon.

D. W. BROSNAN,
Vice President

• • • • •
2. Watches which have been examined and certified to by a designated inspector must be used by train dispatchers, conductors, enginemen, trainmen, firemen, hostlers, yardmasters, yardmen, switch tenders, operators, levermen, maintenance of way foremen, bridge foremen, signal and telephone maintainers, operators of track cars, and such other employees as may be designated.

• • • • •
3. Unless otherwise provided, conductors, enginemen and pilots and others who have access to a standard clock must compare time before commencing each day's work. The time when watches are compared must be registered on a prescribed form. Conductor must compare time with engineman and trainmen, and engineman with conductor and fireman, before commencing day's work or starting on trip, if practicable.

• • • • •
The front of the train must be protected immediately in the same way when necessary by the forward trainman, fireman, or other competent employee.

• • • • •
After lining a main track switch for a train or engine to make a movement facing the switch points, the employee

tending the switch must take a position not less than 20 feet from the switch stand.

• • • • •

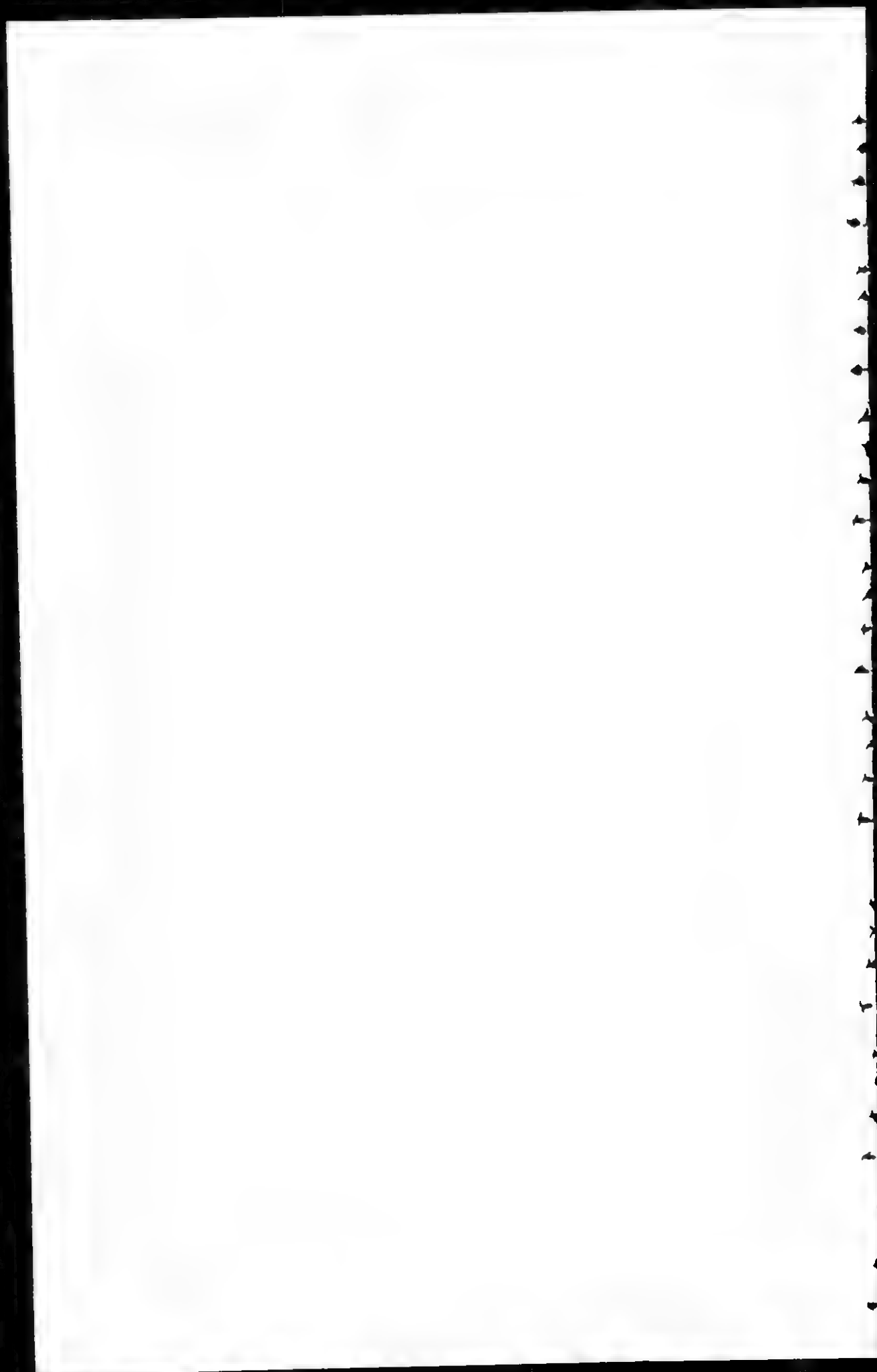
Enginemen must show train orders and clearance cards to firemen and, when practicable, to forward trainmen. Conductors must show train orders and clearance cards, when practicable, to trainmen.

Trainmen and firemen will keep orders in mind and, should conditions require, call attention of conductors and enginemen to their contents.

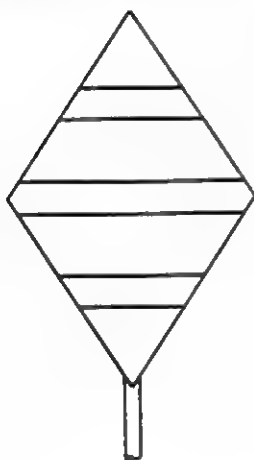
• • • • •

Clearance Form 603 must be delivered together with all train orders to each person addressed. Conductors, enginemen and firemen (or pilot) must, and when practicable trainmen will, see that the information shown on Clearance Form 603 corresponds with the train orders received.

• • • • •



699a



INDICATION--REDUCE SPEED PREPARED TO STOP
SHORT OF CONDITIONAL STOP SIGN
NAME--APPROACH PREPARED TO STOP SIGN

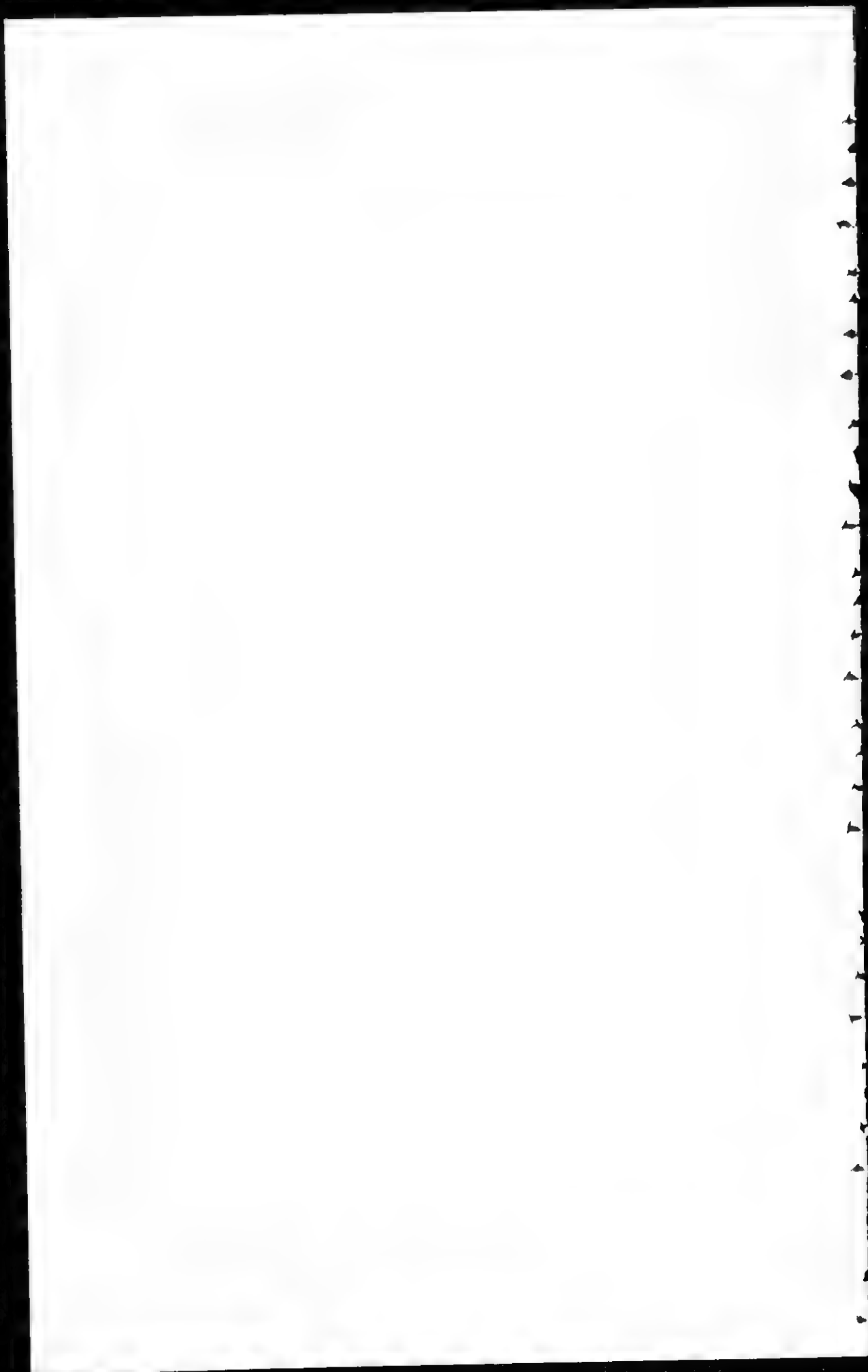
This sign is to be displayed not less than
1½ miles in advance of conditional stop sign.



INDICATION--STOP UNLESS NOTIFIED BY RADIO
COMMUNICATION OR IN PERSON BY MofW
FOREMAN NAMED IN TRAIN ORDER
THAT TRACK IS CLEAR
NAME -CONDITIONAL STOP SIGN

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701a

241. Manual block may be established by train order to govern movements between given points, requiring trains to receive clearance card, Form 603, reading "Block clear" or "Block occupied," before entering the block.

Trains or engines must not be permitted to enter the block until all opposing movements have cleared the block.

Trains and engines receiving Form 603 showing "Block occupied" must move through the entire block at restricted speed.

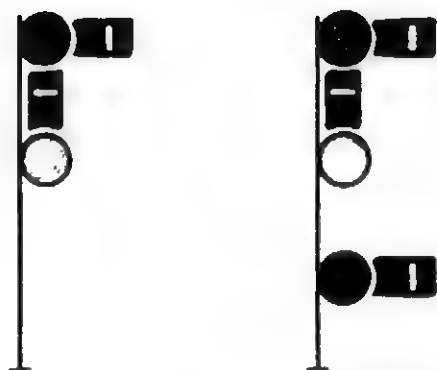
• • • • •
INDICATION-PROCEED, LIMITED SPEED THROUGH TURNOUT OR
CROSSOVER AND APPROACH NEXT SIGNAL AT LIMITED
SPEED

NAME—LIMITED CLEAR
• • • • •



283

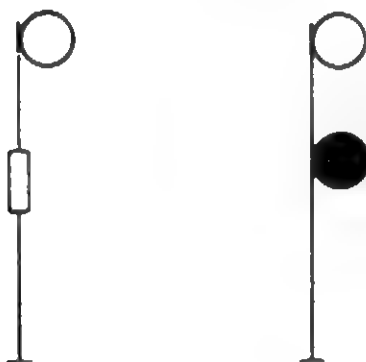
703a



INDICATION—PROCEED THROUGH DIVERGING ROUTE.
OBSERVING AUTHORIZED SPEED THROUGH TURNOUT
OR CROSSOVER

NAME—DIVERGING ROUTE CLEAR

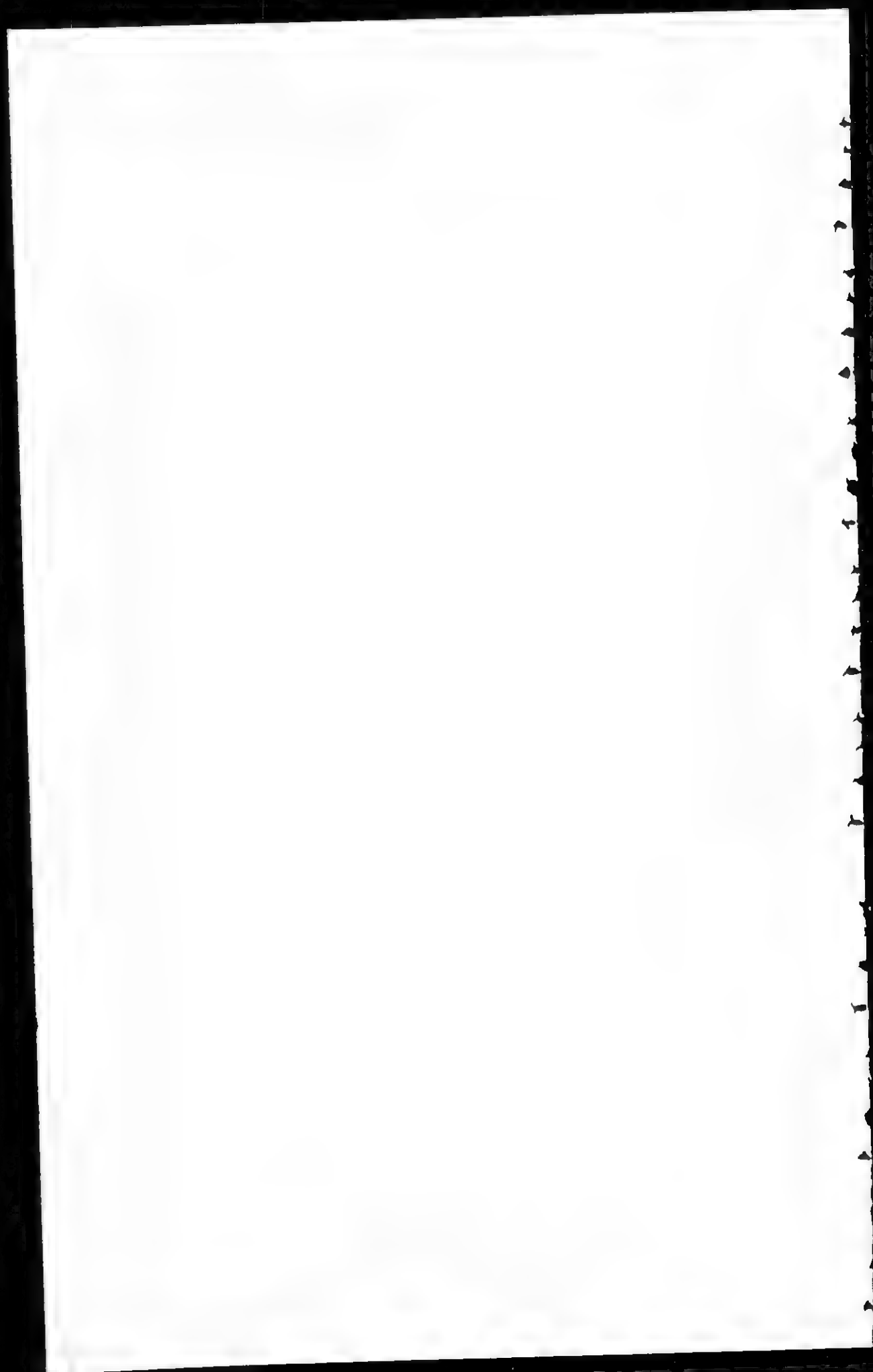
284



FLASHING YELLOW

INDICATION—PROCEED, APPROACHING NEXT SIGNAL AT
SLOW SPEED. TRAIN EXCEEDING MEDIUM SPEED MUST
AT ONCE REDUCE TO THAT SPEED

NAME—APPROACH SLOW



404. Engineman must inform fireman when operating a non-equipped engine or when automatic train stop is cut out. On non-equipped engines fireman must, and on engines when automatic train stop is cut out will when practicable, note the indication of all block signals and call them to the engineman, who will repeat the indication to the fireman.

• • • • •

CENTRALIZED TRAFFIC CONTROL AND REMOTE CONTROL SYSTEMS

530. On portions of the road designated by time table or special instructions as CTC or remote control territory, train and engine movements are authorized by block signals whose indications supersede the superiority of trains for both opposing and following movements on the same track. Within CTC and remote control territory, except as affected by Rules 530 through 549 (both inclusive), and as specifically set forth in other rules, all automatic block signal rules, automatic train stop system rules, interlocking rules and other operating rules remain in force.

531. If a failure of CTC or remote control systems occurs, authority for suspension thereof may be given by train order to trains and engines in the affected territory. Trains and engines may then be authorized to operate in the affected territory by time table, train orders and related rules, and, when such authority is given, it will remain in effect until annulled by train order. Movements over power-operated switches and power-operated derails must be in accordance with Rule 534. Trains and engines must approach railroad crossings, drawbridges and junctions prepared to stop at the home signal.

532. Trains and engines must not enter or foul the main track or cross over from one track to another through electrically-locked hand-operated switches until permission has been obtained from control station. When per-

mission has been secured to enter the main track, switch will be unlocked and thrown before derail or inside switch is operated.

533. Dual-controlled switches and dual-controlled derails must not be operated by hand unless authorized from control station. Trains or engines entering main track or

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crossing over from one main track to the other and using these switches and derails by hand will be governed by Rules 514, 517 and 519. When switching movements have been completed, these switches and derails must be restored to normal position and the selector lever locked in position for power operation. After these switches and derails are operated by hand, trains or engines must not proceed except upon proper signal indication or as authorized.

534. Trains or engines must not pass a Stop signal until authority has been obtained from control station, except at interlockings in accordance with Rule 663. In CTC territory, the control station may authorize the train or engine by train order Form "S" to proceed. When a train or engine is authorized to pass a Stop signal which fails to clear in CTC or remote control territory, such train or engine must proceed at restricted speed, and power-operated switch, power-operated derail and movable frog points must be examined to insure that they are in proper position for the movement and these switch, derail and movable frog points must be observed by a member of train crew stationed at the switch until the leading truck of an engine or car has passed the protecting signal.

535. When a train is delayed at a Stop signal and cause is unknown, or in case of unusual delay, conductor or engineman must notify control station at once.

536. If a signal indication, permitting a train or engine to proceed, after being accepted is changed to a Stop-

indication before it is reached, the stop must be made at once. Such occurrence must be reported to chief dispatcher.

537. A train or engine approaching a signal displaying a

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Stop-indication shall stop before the leading wheels pass the signal.

539. Electrically-lighted call lamps are provided on the track side of CTC bungalows. When lighted, conductor or engineman of a train standing or working in the vicinity of the bungalow should call control station. Also, any signalman or trackman passing the lighted call lamp must call control station.

540. When a train or engine is to do work in CTC or remote control territory, permission must be obtained from control station, specifying time and working limits, and tracks to be used. Tracks specified may then be used in either direction. Flag protection will not be required within the specified limits. Train or engine must be clear of tracks specified by the time stated and will report to control station when clear. When additional time is required, it must be authorized from control station before expiration of previous time limit. If tracks specified are not clear by the time stated, train or engine must be protected in both directions as prescribed by Rule 99.

707. Bulletins will be numbered consecutively on each division, beginning with January 1 of each year, and will be posted at each bulletin station. They will be issued and cancelled by the proper officer. Conductors and enginemen must record name and date they have read and understand bulletins posted. They will be held responsible for compliance with instructions posted.

959. They must, when practicable, ride in the caboose on moving trains in position to observe their trains, but if their presence is required on other parts of the train one of the trainmen must occupy such position.

They must require the trainmen to station themselves on the train as in their judgment may be necessary.

• • • • •

ENGINEMEN

1000. Enginemen are directly responsible to and must obey the orders of division and terminal officers.

1001. They must obey the orders of the shop foreman within shop limits; the orders of their conductors with respect to the handling of their trains or the work in which they are engaged, and the instructions of station agents, stationmasters and yardmasters at stations and in yards where such are employed.

1002. The responsibility of enginemen continues without interruption until completion of the run or the assigned tour of duty, unless they are incapacitated or relieved of responsibility by an officer of the Company.

1003. They are responsible for proper performance and handling of the engine, for care of equipment, economical use of fuel and supplies, the performance of duty by their firemen so far as practicable, instructing them when necessary as to their duties.

1004. They are jointly responsible with the conductor for the safe movement and protection of the train and must decline to obey instructions which involve violation of the rules, or peril to persons or property. They are solely responsible for the observance of and compliance with the indications given by fixed signals, flagmen's signals or other signals affecting head end forward train movement; the responsibility of the conductor in such cases is to secure compliance to the extent of his ability

with the indications of the signals after they come into his view and according to the prescribed method of operation of fixed signals.

1005. They must not receive information from flagmen until train is stopped and must repeat the instructions to firemen in flagman's presence. Work train flagmen are required to present Form 895 or 896.

1006. When there is no conductor, or when the conductor is disabled, the engineman will act as conductor.

1007. They must report for duty at the appointed time and place, inspect their engines where required, and report any defects or irregular conditions.

1008. At points where there is no switching service, and at other points when necessary, they must assist in making up their trains.

1009. They must see that their engines are attached to the train in ample time to insure prompt departure, and that required signals are properly displayed.

1010. They must render necessary assistance in testing air brakes, steam heating or air signal appliances and be assured that they work properly.

1011. They must examine and sign bulletin books before starting on the run and, when practicable, at intermediate stations. They are responsible for the observance of bulletins, after having an opportunity to read them, or after being advised of them by the conductor.

1012. They must maintain as far as practicable regular and uniform speed, avoid sudden increase or checking of speed except to prevent accident, avoid excessive speed on down grades or rounding curves, run with caution where the track is under repair and at any point where conditions require it, and observe speed regulations, speed limit signs and reduced speed signs. See Rule 109.

1013. They must take necessary precautions for safe movement of their trains during or after heavy rains or storms.

1014. For the safety of their train they must keep a vigilant lookout ahead and must also frequently look back to rear.

1015. If there is any indication of defect of track or roadway or high water, they must immediately reduce speed, stopping the train if necessary, and be assured that it is safe before proceeding; they must also notify the train dispatcher and, when possible, other trains of such conditions.

1016. They must sound whistle signals accurately and in accordance with the rules.

1017. They must obey signals promptly and, if in doubt, stop. When moving a train, engine or cars, by hand or light signals, the disappearance from view of employee or light by which signals are given must be construed as a stop signal, unless radio communication is used to complete the movement.

1018. When moving a train, engine or cars by radio communication and contact is lost with employee directing the movement, the movement must be stopped until communication is restored or other signals are used to complete the movement.

1019. When block signals, train order signals or other signals affecting their movement are obscured, they must approach them at reduced speed and if necessary stop and not proceed until it is known that the way is clear.

1020. They must give prescribed whistle and bell signals approaching stations, public crossings and train order offices, and must know that the train order signals are operated according to the rules and display proper indication before passing them.

1021. The indication and position of switches must be carefully observed when approaching them.

1022. They must see that the front of their train is protected as prescribed by Rules *S-87*, *S-88*, *S-89* and *99*, or whenever it is otherwise necessary.

1023. They must always have in their cab, in an accessible location, proper flagging equipment.

1024. When conditions require front or rear end protection they must give prescribed whistle signals. They must anticipate as far as possible the necessary rear protection.

1025. If an obstruction is seen on another track they must protect it and notify other trains.

1026. They must require forward brakeman to take proper position on the train, whenever necessary.

1027. They must not apply the air brakes, or keep them applied, while passing over bridges or trestles, except in cases of emergency.

1028. They must not leave their engine while on duty except in case of necessity, and then only in the care of the fireman. They must not leave them while on the main track, except to perform duties required by the rules.

1029. They must not permit the fireman to operate the engine except when they are present and under their supervision, or upon an order from the superintendent.

1030. When an engineman is relieved by another they must exchange train orders and instructions and compare with conductor before proceeding.

1031. They must avoid the slipping of wheels as far as possible.

They must not use sand while passing over switches, derails and the rail connections of drawbridges.

1032. If a fire is seen on or near the right of way they must notify the MofW foreman or supervisor, if practicable, and the train dispatcher promptly, but if a structure is endangered they must stop and extinguish the fire if possible.

1033. The "dead man pedal" on engines in motion must

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be held in depressed position only with the engineman's foot.

1034. At the completion of the run they must deliver the engine at the designated place. They must make prescribed inspection and proper report of its condition.

FIREMEN

1050. Firemen are directly responsible to and must obey the orders of division and terminal officers. They must obey the orders of the shop foreman within shop limits, and, when with an engine, they must obey the orders of the engineman.

1051. They are jointly responsible with the engineman for proper performance of the engine and, when necessary, the protection of the front of their train.

1052. They must report for duty at the appointed time and place, examine bulletin books when practicable, and see that the engine is properly equipped with signals and supplies.

1053. When other duties permit and for the safety of their train, they must keep a lookout for signals, obstructions or defects of track or of their trains and instantly warn the engineman, keep the train orders in mind and call them to the attention of the engineman when necessary.

1054. They must not move the engine in the absence of the engineman except on instructions of proper authority.

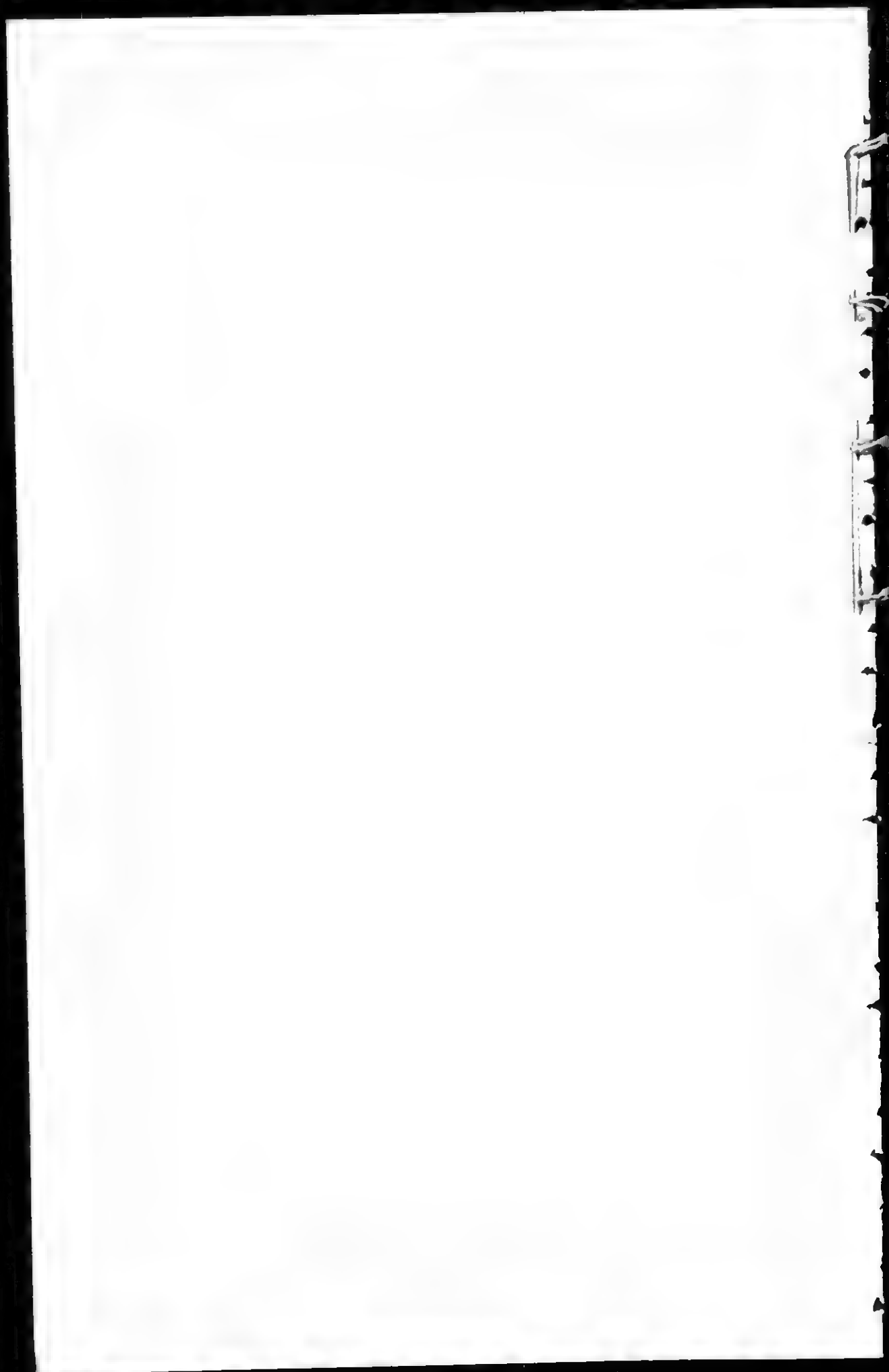
1055. Steam generators on diesel units must not be blown down in the vicinity of passenger stations or at other locations where it would be hazardous or cause personal injury.

1056. On engines they must assist the engineman in checking all fuel gauges, water gauges, temperature

136

gauges, cooling fans, fuel and lubricating oil gauges, battery charging circuits, other gauges indicating correct and proper operation of equipment, and must start and stop diesel engine at initial and final terminals when necessary. In passenger service, at initial terminals they must start steam generators and be prepared to turn steam to the train when called for. At final terminals, they must shut down steam generators, unless otherwise instructed by proper authority.

• • • • •



715a

Defendants' Exhibit 8

SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., February 11, 1963

Following changes in Book of Operating Rules will become effective March 1, 1963:

Rule 281(a), Page 88—description of indication and name are revised to read as follows:

INDICATION--PROCEED THROUGH DIVERGING ROUTE
OBSERVING AUTHORIZED SPEED THROUGH TURNOUT
OR CROSSOVER AND APPROACH NEXT SIGNAL AT
LIMITED SPEED.
NAME--APPROACH LIMITED

Rule 284, Page 91—diagram of aspects is revised to show the following:

284



Stickers covering these changes will be distributed, and should be affixed in the proper places in Book of Operating Rules.

J. A. Rust
Vice President

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716a

INDICATION—PROCEED THROUGH DIVERGING ROUTE,
OBSERVING AUTHORIZED SPEED THROUGH TURNOUT
OR CROSSOVER AND APPROACH NEXT SIGNAL AT
LIMITED ~~SPEED~~.
NAME—APPROACH LIMITED

88

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717a

284



SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., March 20, 1962.

Following change in Diverging Route Clear signals, Rule 283, top of page 91, Book of Operating Rules, will become effective April 1, 1962:

283

INDICATION—PROCEED THROUGH DIVERGING ROUTE,
OBSERVING AUTHORIZED SPEED THROUGH TURNOUT
OR CROSSOVER
NAME—DIVERGING ROUTE CLEAR

Stickers covering this change will be distributed, and should be affixed in the proper place in Book of Operating Rules.

D. H. MacLeod,
Vice President

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719a

283



INDICATION—PROCEED THROUGH DIVERGING ROUTE,
OBSERVING AUTHORIZED SPEED THROUGH TURNOUT
OR CROSSOVER
NAME—DIVERGING ROUTE CLEAR

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SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., May 25, 1961.

Following new rule in Book of Operating Rules will become effective June 1, 1961:

718. Employees are prohibited from climbing upon the roof of freight cars and also from riding or walking on the roof of such cars.

Stickers covering this new rule will be distributed, and should be affixed in the proper place in Book of Operating Rules.

E. M. TOLLESON,
Vice President.

717. When a pilot is assigned to a train the requirements of the rules, including the execution of trains orders, also apply to the pilot.

718. Employees are prohibited from climbing upon the roof of freight cars and also from riding or walking on the roof of such cars.

TRAIN DISPATCHERS

750. Train dispatchers will report to the chief dispatcher.

751. They are in charge of train movements and will issue train orders over the signature of the chief dispatcher and in accordance with the rules. They must take necessary precautions for the safe movement of trains at all times.

OPERATORS

800. Operators will report to the chief dispatcher and in relay offices to the manager.

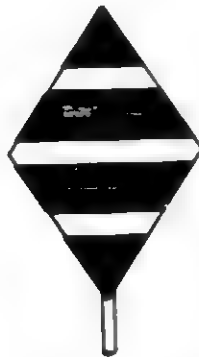
801. They will obey the instructions of the station agent with respect to any duties required of them in connection with station work, but must not

722a
SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., May 19, 1961.

Following change in Approach Prepared to Stop Sign, top of page 83, Book of Operating Rules, will become effective June 1, 1961:



INDICATION—REDUCE SPEED PREPARED TO STOP
SHORT OF CONDITIONAL STOP SIGN
NAME—APPROACH PREPARED TO STOP SIGN

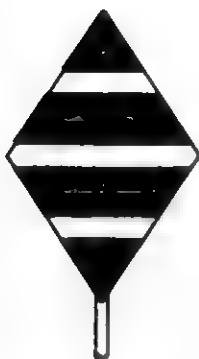
This sign is to be displayed not less than
1½ miles in advance of conditional stop sign.

Stickers covering this change will be distributed, and should be affixed in the proper place in Book of Operating Rules.

E. M. Tolleson,
Vice President.

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from the original

723a



INDICATION—REDUCE SPEED PREPARED TO STOP
SHORT OF CONDITIONAL STOP SIGN
NAME—APPROACH PREPARED TO STOP SIGN

This sign is to be displayed not less than
 $1\frac{1}{2}$ miles in advance of conditional stop sign.

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SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., June 22, 1960.

Following change in Book of Operating Rules will become effective July 1, 1960:

- - - - -

Rule 959, page 126, is revised:

"959. They must, when practicable, ride in the caboose on moving trains in position to observe their trains. If they observe or are notified by radio communication or otherwise of hot boxes or other defects in their train, their first duty is to by radio promptly instruct their engineer to stop the train for inspection. If their presence is required on other parts of the train one of the trainmen must occupy such position and perform these duties.

"They must require the trainmen to station themselves on the train as in their judgment may be necessary."

- - - - -

Stickers covering this change will be distributed, and should be affixed in the proper place in Book of Operating Rules.

D. W. BROSNAN,
Vice President.

959. They must, when practicable, ride in the caboose on moving trains in position to observe their trains. If they observe or are notified by radio communication or otherwise of hot boxes or other defects in their train, their first duty is to by radio promptly instruct their engineer to stop the train for inspection. If their presence is required on other parts of the train one of the trainmen must occupy such position and perform these duties.

They must require the trainmen to station them-

SOUTHERN RAILWAY SYSTEM

Office of Vice President

Washington, D. C., June 10, 1960.

Following new rule in Book of Operating Rules will become effective June 15, 1960:

- - - - -

1035. Enginemen notified by radio communication of hot boxes or other defects in their train must by radio promptly acknowledge such notification and stop train immediately for inspection.

- - - - -

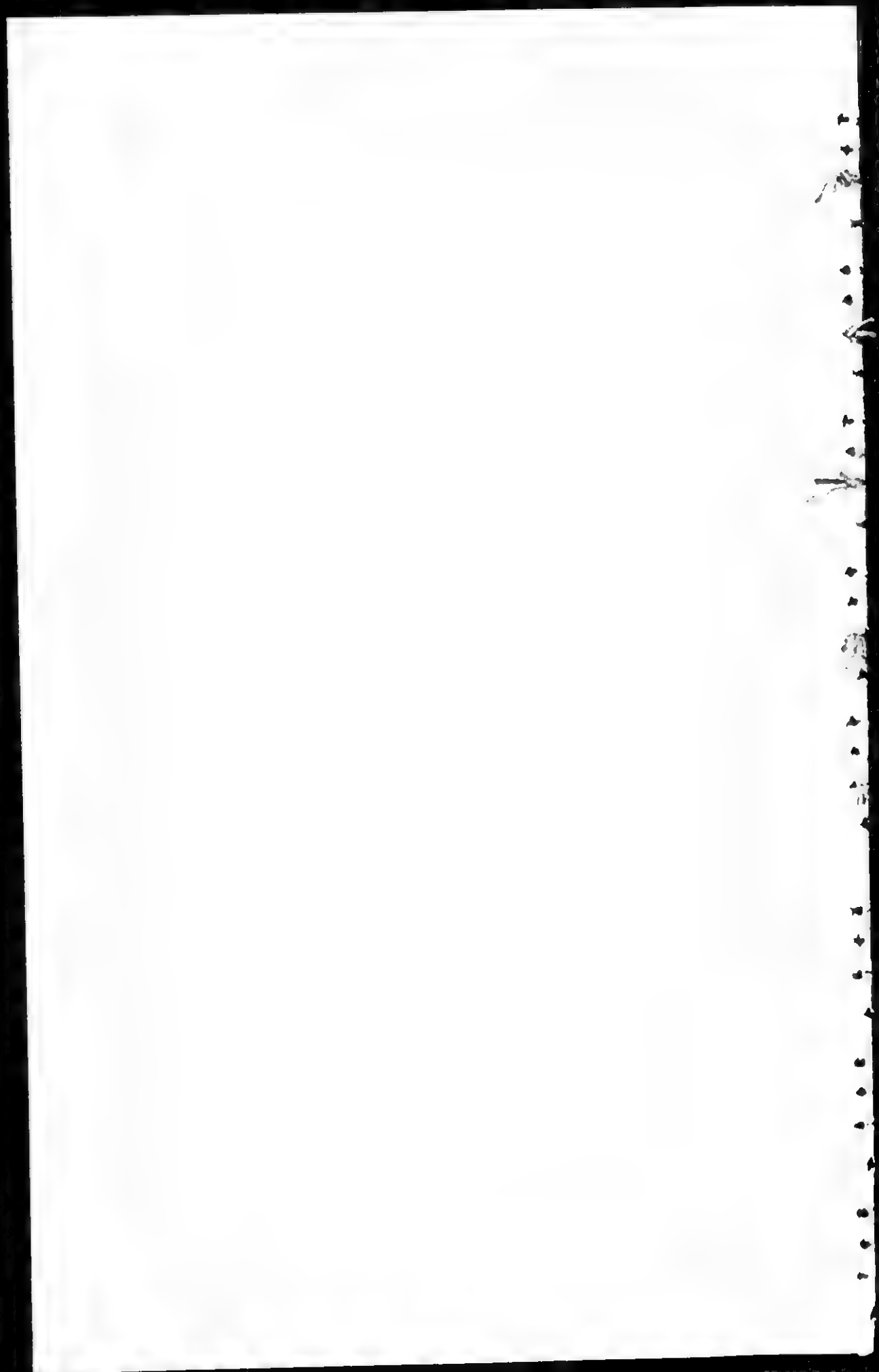
Stickers covering this new rule will be distributed, and should, be affixed in the proper place in Book of Operating Rules.

D. W. BROSNAN,
Vice President.

tion must be held in depressed position only with the engine-man's foot.

1034. At the completion of the run they must deliver the engine at the designated place. They must make prescribed inspection and proper report of its condition.

1035. Enginemen notified by radio communication of hot boxes or other defects in their train must by radio promptly acknowledge such notification and stop train immediately for inspection.



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Defendants' Exhibit 9
RULES AND REGULATIONS
OF
THE CHESAPEAKE AND OHIO
RAILWAY COMPANY
(CHESAPEAKE DISTRICT)

FOR THE GOVERNMENT OF THE
OPERATING DEPARTMENT

EFFECTIVE 12:01 A. M.
March 31, 1951

Superseding All Previous Rules and
Instructions Inconsistent Therewith
Reprinted February, 1953
Richmond, Virginia

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Defendants' Exhibit 10
RULES AND REGULATIONS
OF
THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

FOR THE GOVERNMENT OF THE
OPERATING DEPARTMENT

EFFECTIVE 12:01 A. M.

October 26, 1958

Superseding All Previous Rules and
Instructions Inconsistent Therewith
Cleveland, Ohio

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2881-62

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Plaintiff

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Defendants*

Order Denying Stay

Upon consideration of the motion of the defendants for a stay pending appeal from the court's order of May 29, 1963 entered herein, and the court having considered the said motion, and having heard argument by counsel for the plaintiff and counsel for the defendants in open court, it is by the court this 31 day of May, 1963,

ORDERED, that the defendants' motion for a stay suspending the operation of the order entered herein on May 29, 1963, during the pendency of the appeal taken by the defendants, be and the same is hereby denied.

Judge

[Filed Nov. 6, 1963]

Memorandum and Order

This matter comes before the court on plaintiff's motion for issuance of an order to show cause and for judgment of contempt against the defendant railroad. The motion was heard on September 12 and 13, 1963, and briefs were submitted subsequent thereto.

The plaintiff asserts that the Railroad had failed to comply with the Order of this Court of May 29, 1963. That Order required the Southern Railway to "interpret

Section 4 of the Diesel Agreement as it was interpreted prior to July of 1959". The Order further required:

. . . that the defendants herein shall maintain the *status quo* with respect to their operation of locomotives and the use of firemen thereon in the application of Section 4 of the Diesel Agreement, by making available sufficient firemen to comply with said Section 4, and by following the same procedures employed by defendants and maintaining the same working conditions as were maintained by the defendants in the employment and application of said Section 4 during the period 1950 to 1959; . . .

The Order granted the defendants thirty days, or until June 28, 1963, in which to comply; and, further stated that the Order would remain in effect until the National Railroad Adjustment Board made a determination of the issues then before it.

The Order was entered following a Memorandum Opinion filed on May 14, 1963. See *Brotherhood of Locomotive Firemen and Enginemen v. Southern Railway Co., et al.*, 217 F. Supp. 58.

The Brotherhood asserts that the railroad has violated the Court's order in that locomotives have operated without "the use of firemen thereon", and that the defendants have failed to follow the same procedures and to maintain "the same working conditions as were maintained by the defendants . . . during the period 1950 to 1959."

Plaintiff alleges that the contempt arises from two separate actions by the defendants: first, the defendants operated 46 locomotives without the services of firemen between June 28 and September 1, 1963; and second, defendants have hired 223 "aged" men as firemen without regard to their ability or qualifications, and instructed these new men that their only duty consisted of occupying the firemen's seat on the locomotive.

Defendants concede that 46 (in fact, 47) trains did operate without firemen; but that during this period, Southern operated more than 42,000 trains and the 46 represents one-tenth of one per cent, which, counsel asserts, is a good faith effort to comply with the order.

The defendants further concede that the men hired as firemen since May 29, 1963, are over sixty, and were instructed that they had no duties to perform other than to occupy the firemen's seat on the locomotive; that this was done, not to flaunt the mandate of this court, but in order to benefit from rapid attrition in the event that the final disposition of these issues will permit the carrier to operate diesel locomotives without firemen.

The Brotherhood alleges that the conduct of the Railroad amounts to civil and criminal contempt. In the leading case of *United States v. United Mine Workers of America*, 330 U. S. 258 (1947), the Court, at page 302, stated:

Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Bucks Stove & Range Co.*, supra at 441 (221 U.S.). The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these

standards, great reliance must be placed upon the discretion of the trial judge.

Continuing at page 303, the Court stated:

. . . Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.

This Court, then, is faced with two questions:

(1) Did the defendants' conduct, in operating 47 trains without the presence of firemen during the period of June 28 to September 1, 1963, and in actually employing 223 firemen over the age of sixty with the instruction that their sole duty was to occupy the fireman's seat, amount to "willful and deliberate defiance of the court's order? And,

(2) Does this conduct require this court to impose sanctions to force future compliance with the Order of May 29, 1963, or to compensate the plaintiff Brotherhood?

It is the opinion of this court that both questions must be answered in the negative.

The primary allegation of contempt is the contention by the Brotherhood that the Southern has contravened the Order of this Court by hiring 223 "aged" men without regard to physical or educational standards, and by directing that these new hires are to perform none of the duties normally performed by firemen.

On July 1, 1963, Southern changed its operating rules to eliminate the duties formerly performed by firemen. Plaintiff contends that this action was taken in direct contravention of our order. However, it is conceded that these rules have not been the subject of collective bargain-

ing between the parties; and, further, that the rules have been changed on prior occasions without consultation with the Brotherhood.

Our Order of May 29 refers to "working conditions", and specifically, to Section 4 of the Diesel Agreement which, under its present interpretation, requires that a fireman be employed on all locomotives. This order was entered pursuant to the plaintiff's successful contention that the carrier was not complying with this working condition which had been the subject of collective bargaining. The effect of our Order required that this condition be maintained, as required by Section 6 of the Railway Labor Act, 45 U.S.C. 156, until the matter was settled by the National Railroad Adjustment Board.

There was no dispute at that time as to operating rules which were, and remain, the sole responsibility of management. To now expand that order to include rules as well as conditions would be an unwarranted interference with the functions of management. Further, in *Terminal R. R. Assn. v. United States*, 266 U. S. 17, 29 (1924), the Supreme Court stated that

In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purposes for which the suit was brought; and the facts found must constitute a plain violation of the decree so read.

The defendant has offered an explanation for its change in the operating rules to show that the change was not made for the purpose of avoiding or flaunting the order of the court. The carriers are hopeful that the final settlement of their dispute with the Firemen will permit the firemen to be removed through attrition. This is in accordance with the procedure recommended in the Report to the President by the Emergency Board, dated May 13,

1963. If this recommendation becomes a reality and the carrier has 223 new employees over the age of sixty, the attrition will occur more rapidly.

It is also noteworthy that the Brotherhood contends that operating a locomotive with one of the 223 new employees sitting in the fireman's seat is, for all practical and legal considerations, "equivalent to having a bag of sand occupy the fireman's seat". Yet, the Brotherhood has actively solicited these new hires for membership as firemen. Thus, the plaintiff is in the untenable position of arguing that these men are not actually employed as firemen, while, at the same time actively soliciting them for membership in their union. This is particularly significant in light of the fact that the Brotherhood's constitution states that an applicant for membership must be "actually employed as a locomotive fireman (helper) . . .".

It is the opinion of this Court that the defendant railroad has offered a satisfactory explanation for the change in work rules. There has been no showing that this change was made in contempt of our order.

There was a technical violation of the Order by the action of the defendants in operating 47 locomotives without the presence of firemen. However, it has been stipulated that the Southern operated more than 42,000 trains between June 28 and September 1, 1963. This would hardly amount to a willful and deliberate defiance, but, in our opinion, a remarkable effort to comply with the Order. The Court's order did not require the carrier to operate with firemen until June 28th. According to the stipulation entered into between the parties, 35 of the 47 incidents occurred between June 28th and June 30th, and none have occurred since August 19th. These few instances do not amount to contempt and this court rules that there has been a substantial compliance in good faith.

Also, it is the Court's recollection that at the time of the original hearing on the injunction, counsel for both parties

agreed that in order to return to the *status quo* the carrier would be required to hire from one hundred to one hundred and thirty-five new firemen. Good faith on the part of the railroad is further demonstrated by the fact that they were actually required to hire two hundred and twenty-three new men, far in excess of the number anticipated.

This Court has previously required the Southern Railway to return to the working conditions which existed prior to 1959. The evidence and the record indicate that defendants have complied with this decree. We will not expand our Order to interfere with the operating rules of the railroad. No contempt has been established.

Accordingly, it is this 6th day of November, 1963,

ORDERED, that plaintiff's motion for issuance of an order to show cause and for judgment of contempt, be, and the same hereby is, denied.

LEONARD P. WALSH

Leonard P. Walsh, *Judge*

**Motion for Reconsideration of Order Denying Plaintiff's
Motion for Judgment of Contempt**

Comes now the plaintiff, by its attorneys, and moves the Court to reconsider its order of November 6, 1963, denying plaintiff's motion for judgment of contempt, and to grant said motion. In support thereof, plaintiff files the accompanying points and authorities.

Order

This Court, having considered Plaintiff's Motion for Reconsideration of the Order of this Court, dated November 6, 1963, denying plaintiff's motion for judgment of

742a

contempt against the Southern Railway Company, it is this 4th day of December, 1963,

ORDERED, that Plaintiff's motion for reconsideration be, and the same hereby is, denied.

LEONARD P. WALSH
Judge

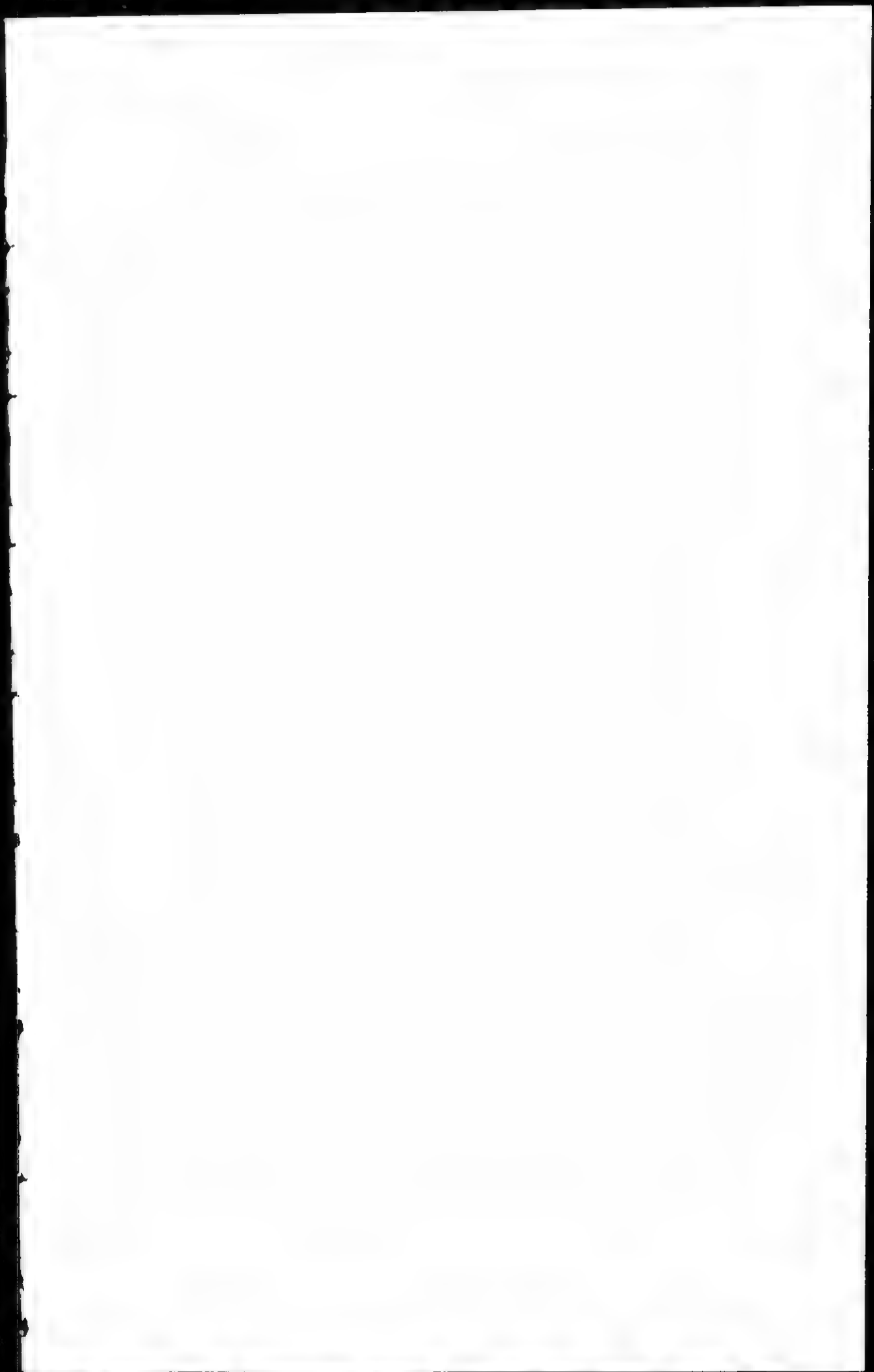
[Filed Dec. 27, 1963]

Notice of Appeal

Notice is hereby given that Brotherhood of Locomotive Firemen and Enginemen, plaintiff in this action, hereby appeals to the United States Court of Appeals for the District of Columbia from the order denying plaintiff's motion for issuance of an order to show cause and for judgment of contempt, entered November 6, 1963 (motion for reconsideration denied December 4, 1963).

MILTON KRAMER
*Attorney for Appellant
Brotherhood of Locomotive
Firemen and Enginemen
1625 K street, N. W.
Washington, D. C. 20006*

December 27, 1963



BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED APR 6 1964

No. 18,405

Nathan J. Paulson
CLERK

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,
Appellant

v.

SOUTHERN RAILWAY COMPANY, ET AL, *Appellees*

Appeal from an Order of the United States District Court
for the District of Columbia

SCHOENE AND KRAMER
1625 K Street, N. W.
Washington 6, D. C.

MILTON KRAMER

HEISS, DAY AND BENNETT
Keith Building
Cleveland 15, Ohio

HAROLD C. HEISS
RUSSELL B. DAY
Attorneys for Appellant

April 6, 1964

QUESTION PRESENTED

Was the conduct of the appellees, in hiring 223 elderly men and placing them on the firemen's seat on locomotives, with instructions to do nothing but sit there (and who in fact complied with such instructions and performed no services), compliance with an injunction ordering appellees (1) to "operate their locomotives in accordance with . . . the actual operation of locomotives . . . prior to July of 1959 . . . " and (2) to "maintain the status quo with respect to . . . the use of firemen thereon . . . by . . . maintaining the same working conditions as were maintained . . . during the period 1950 to 1959 . . . "?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,405

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

SOUTHERN RAILWAY COMPANY,
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY,
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,
THE NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
THE NEW ORLEANS TERMINAL COMPANY,
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY,
ST. JOHNS RIVER TERMINAL COMPANY,
CAROLINA AND NORTHWESTERN RAILWAY COMPANY
Appellees.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was brought to enjoin the appellees, defendants below, from violating the Railway Labor Act (45 U.S.C. §§ 151 et seq.). Jurisdiction in the District Court was predicated on 28 U.S.C. § 1337 and 11 D. C. Code § 306.

The Court below issued an injunction and appellant thereafter brought contempt proceedings charging that

certain conduct was in violation of the injunction. The District Court entered an order holding the conduct not to be in violation of the injunction. Such order was a final order and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

For many years the parties have had a collective bargaining agreement, to which the other railroads of the country are also parties, which provides:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives * * * ." J.A. 422-23, 428.*

In 1959 the Southern stopped hiring new firemen as vacancies arose, and when no firemen theretofore hired was available to serve as helper it ran trains without a helper. With the passage of time the operation of locomotives without a helper of course became more frequent. The Brotherhood commenced an action against the Southern complaining that such conduct was a unilateral change in violation of the Railway Labor Act. After extensive proceedings, the District Court issued an Opinion (J.A. 464) finding Southern's unilateral change in rules and working conditions to be in violation of the Railway Labor Act and entered an order (J.A. 477) providing in pertinent part:

- (1) "** * * defendants shall operate their locomotives in accordance with said interpretation and the actual operation of locomotives under the agreement during the period prior to July of 1959: * * * .*"
- (2) "** * * the defendants herein shall maintain the status quo with respect to their operation of loco-*

* By order of this Court the Joint Appendix in No. 17,891 has been made part of the record on this appeal. The Joint Appendix on the appeal from the contempt proceedings has not yet been printed but will be denominated volume 2 and its first page will be numbered 481A.

motives and *the use of firemen thereon* in the application of Section 4 of the Diesel Agreement, by making available sufficient firemen to comply with said Section 4, and by following the same procedures employed by defendants and *maintaining the same working conditions as were maintained* by the defendants in the employment and application of said Section 4 *during the period 1950 to 1959: * * **" (Italics supplied.)

* * * * *

- (4) "IT IS FURTHER ORDERED, that this Order shall remain in effect until the National Railroad Adjustment Board makes a determination in the case submitted to it by the defendants on January 14, 1963; or, until the agreement between the parties is modified in accordance with the Railway Labor Act."

The District Court's order allowed a period of thirty days for Southern to get in compliance. Southern sought a stay of the order pending appeal, in the District Court, in this Court, and in the Supreme Court, but all courts denied the motion for stay. Southern appealed from that order and that appeal is now pending in this Court. No. 17,891.

Southern thereupon hired elderly men without regard to qualifications such as vision, literacy, etc., instructed them to sit on the helper's seat but to perform no services, not to talk, not to take orders from the engineer, and to do nothing but sit, and these men complied with those orders—they did nothing but sit. The Southern also amended its Operating Rules to delete therefrom all duties of firemen (helpers). J.A. Vol. 2, Dft's. Exh. 1.

The Brotherhood then filed a motion in the District Court that Southern be required to show cause why it should not be adjudged guilty of contempt. After hearing, the Court below found Southern's conduct not to be in violation of the injunction.

STATEMENT OF POINTS

1. In the light of the issues and purposes for which this action was commenced and an injunction obtained, Southern's conduct violated the injunctive order.

2. The amendment by Southern of its Operating Rules to abolish all duties of firemen (helpers) was intended to be contemptuous.

3. The contempt of appellees was both criminal and civil.

4. The power of a railroad to amend its operating rules may not be abused to enable it to achieve the unlawful objectives of violating an injunction or violating the Railway Labor Act.

5. The Brotherhood is not precluded from pressing contempt charges because it has accepted the new men as members.

SUMMARY OF ARGUMENT

1. On its face, the operation of its locomotives by Southern without a fireman (helper) performing any services is not compliance with an order that it operate its locomotives in accordance with their operation prior to July 1959, when all locomotives were operated with the services of a fireman (helper), nor was such operation compliance with an order that it maintain the status quo of the working conditions, with respect to the *use* of firemen, that existed prior to 1959. But in light of the fact that the purpose of this action and the issues in the trial on the merits were to compel Southern to continue the *employment* of firemen as members of the crew, any doubt that Southern's conduct was contumacious should be dispelled.

2. Assuming that no collective bargaining agreement prevented Southern from amending its operating rules to eliminate all duties of firemen contained therein, such circumstance did not give it the privilege of operating its locomotives in violation of the injunction ordering it to

use firemen as they were used prior to 1959, especially since the injunction was not predicated on the contents of the book of operating rules.

3. Since Southern's conduct was in defiance of the authority of the judiciary and was willful, it should be found in criminal contempt to vindicate public authority and as a deterrent. And since Southern must be coerced into compliance with the District Court's order and must suitably compensate appellant for its harm, civil contempt should be found.

4. The Court below, on a mistaken understanding of a provision of the Brotherhood's constitution, found the Brotherhood precluded from complaining of the use (or non-use) of the new men because it admitted them to membership, thereby acknowledging they were actually working as firemen. This was clear error for a number of reasons, one of which is that the Constitution provides for admission not only of applicants actually employed in the craft but also of those holding seniority rights to such work.

ARGUMENT

I. Southern's Conduct Was in Contempt of the Injunctive Order Especially in Light of the Issues on the Merits of the Original Complaint

On May 29, 1963, the District Court issued an order requiring Southern to perform certain affirmative acts for the purpose of bringing themselves into compliance with *status quo* requirements of the Railway Labor Act. Those affirmative acts were described by the Court's order in the following language (J.A. 477):

- (1) "... the parties ... shall interpret Section 4 of the Diesel Agreement as it was interpreted prior to July of 1959, and *defendants shall operate their locomotives in accordance with said interpretation and the actual operation of locomotives under the agreement during the period prior to July of 1959: ...*"

- (2) "... the defendants herein shall maintain the status quo with respect to their operation of locomotives and the use of firemen thereon in the application of Section 4 of the Diesel Agreement, by making available sufficient firemen to comply with said Section 4, and by following the same procedures employed by defendants and maintaining the same working conditions as were maintained by the defendants in the employment and application of said Section 4 during the period 1950 to 1959: ..." (Italics supplied)

The Court allowed Southern thirty days within which to bring themselves in compliance. J.A. 478.

On August 12, 1963, appellant moved the Court to require Southern to show cause why they should not be adjudged guilty of criminal and civil contempt by reason of their having wilfully violated the order of the Court. The acts of Southern which the Brotherhood deems to be a violation of the Court's order are the operation of locomotives without "the use of firemen thereon," and the failure to follow "the same procedures * * * and maintaining the same working conditions as were maintained by the defendants * * * during the period 1950 to 1959."

Before describing the specific acts which the Brotherhood asserts are violations of the May 29, 1963 order, let us first refer to the dispute which forms the background of the May 29, 1963 order. This is done because of an objection by counsel for Southern in the course of the hearing to the introduction of certain evidence offered by appellant and their reliance on a case they cited.

Southern's counsel asserted that the Court would be violating established procedure in contempt proceedings if it permitted the introduction of evidence regarding the nature of work and services customarily performed by firemen as members of the defendants' train or switching crews prior to July 1959. During the earlier hearing which developed the basis for the May 29, 1963 order, no evidence was in-

troduced for the purpose of showing the nature of the services and work that firemen customarily and normally performed prior to July 1959. Counsel for Southern contended during the contempt proceedings that if the Court permitted evidence on this subject to be introduced, the Court would be allowing the contempt proceeding to be expanded beyond the scope of the original trial, and the decree of May 29, 1963 would likely be similarly expanded beyond its original intendment, citing *Terminal Railroad Association of St. Louis v. United States*, 266 U.S. 17 (1924), as authority for their objection.

The rule for which that case is authority is contained in the following quotation from that case:

"In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms *when read in the light of the issues and the purposes for which the suit was brought*; and the facts found must constitute a plain violation of the decree so read." (266 U.S. 17 at 29) (Emphasis Ours.)

Let us then look at "the issues and the purposes for which the suit was brought." At page 5 in the District Court's opinion, under the subtitle "Findings and Conclusions," the Court stated the basic issues raised by the pleadings and the evidence to be as follows:

"On or about July 13, 1959, the Southern began operating some trains without firemen or helpers.

"Plaintiff contends that this constitutes a violation of Section 2, First; Section 2, Seventh; and Section 6 of the Railway Labor Act (145 U.S.C.A. 152, First, Seventh; 145 U.S.C.A. 156).

"Defendants contend that the only issues involved here are issues of contract interpretation and application, the resolution of which lies within the primary administrative jurisdiction of the National Railroad Adjustment Board and are not for determination by the court. * * *

"However, the determination that this dispute should be settled through the Adjustment Board does not give the parties the authority to change the conditions which existed under the contract, from 1950 through 1959. This is expressly prohibited by Section 6 of the Railway Labor Act, which states:

'... In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or *working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 155 of this title . . .*' (Emphasis ours) (45 U.S.C. 156)."

"In so holding the Court does not rule on the interpretation of Section 4 of the agreement between the parties. This task is for the Adjustment Board in accordance with the procedure of the Act and in order to effectively utilize the expertise possessed by the members of the Board. . . ." (J.A. 468-69)

"... We merely hold that the defendant railroad are not entitled to Act independently and effect a new interpretation of Section 4 of their agreement and thereby alter working conditions in contravention of Section 6 of the Railway Labor Act.

"The change in working conditions to which we refer is not the defendants' refusal to hire additional firemen, but rather *their practice of operating locomotives without the services of a fireman or helper*. It was the practice of the Railroads to operate locomotives with a fireman or helper from 1950 through 1959, presumably because of their understanding that section 4 of their agreement so required. It is not for this Court to say that this is required, either by the agreement or by custom and practice; neither is it for the Court to say that the language of section 4 requires that additional firemen be hired to replace those lost by attrition. These matters are for the Adjustment Board.

"But it is clear to this court that the practice of operating locomotives with a fireman or helper consti-

tutes a 'working condition' within the meaning of Section 6 of the Railway Labor Act. The defendants are prohibited from changing this condition until the Adjustment Board resolves the controversy over the language of section 4 of the agreement between the parties." (Italics supplied) (J.A. 469-70)

No one can be in doubt regarding the purpose of the instant suit. Its purpose was to compel Southern to continue the "*employment*" of a fireman or helper as a member of its train and switching crews and the use of his services in the same manner and under the same conditions that they had consistently been employed and used by defendants prior to July 1959, until such time as the dispute over the interpretation of Section 4 of the Diesel Agreement is settled by the National Railroad Adjustment Board or until the terms of the Diesel Agreement are changed in the manner prescribed by the Railway Labor Act. Or, to use the Court's language, the purpose of the action was to prevent Southern from changing the "working conditions" of its engine-service employees, by ceasing the "practice of operating locomotives *without the services of a fireman or helper,*" until such time as its proposed change in working conditions was accomplished in a lawful manner.

No hint of a dispute existed or developed in the course of the hearing that preceded the issuance of the May 29, 1963 order relative to the nature of the *services* that firemen or helpers had rendered as members of Southern's train and switching crews prior to July 1959. Plaintiff and defendants were each equally aware of the work that firemen or helpers have been rendering for many years as members of the train and switching crews. There was no need or occasion at that time for the Court to concern itself with the nature or the extent of those services. Whatever those services were, the dispute arose from Southern operating locomotives without a fireman. When the Court referred in its memorandum opinion to the "practice of operating

locomotives without the services of a fireman or helper," implicit in this reference was the undisputed fact that firemen or helpers had theretofore customarily performed services as members of the crews. This reference to the "services" heretofore performed by the fireman or helper negates the thought or assumption that firemen rode locomotives but rendered no services.

It is simply frivolous for Southern to assert that they failed to understand that the purpose of the instant suit and the purpose of the injunction was to require Southern to re-establish and continue the practice that obtained prior to July 1959 of employing a fireman or helper as a member of the defendants' engine and train crews performing the traditional fireman services. It is inconceivable that any person acquainted with the dispute from which this litigation stemmed and who participated in the proceedings could have understood that "the issues and the purposes" of the suit was to require Southern to place a person on the fireman's seat, but to render no services as a member of the engine crew. Thus the issues posed by the contempt proceeding do not go beyond "the issues and purposes for which this suit was brought" initially, and a decision finding contempt cannot be said to expand the injunction beyond the meaning of its terms as that meaning must necessarily have been grasped by any person who participated in the dispute.

The Brotherhood asserts that Southern have flouted the injunction in three respects:

- (1) By the employment since June 28, 1963 of 223 aged men without regard to their ability to perform the duties customarily performed by firemen or helpers prior to July 1959, and, what is far more reprehensible, they have been employed with instructions not to perform any services and to do nothing but ride the fireman's seat on the locomotive.

- (2) Between May 29, and September 1, 1963, Southern operated 46 locomotives without anyone even called a fireman being a member of the crew.
- (3) On July 1, 1963, three days after the injunction became effective on June 28, 1963, Southern posted bulletins informing its firemen and engineers that, effective July 1, 1963, all rules contained in its book of operating rules prescribing the duties of firemen or helpers, were cancelled and deleted. (Tr. 215). By this action the defendants undertook to inform the 1,000 or more firemen or helpers (Tr. 246) employed prior to 1960 and having seniority as firemen and accustomed to performing the services normally rendered by firemen or helpers that on and after July 1, 1963, no services would be required of them and their responsibilities as members of the train and switching crews would cease.

Turning to the hiring of the 223 new employees described in paragraph (1) above, the question presented by this action in the face of the May 29, 1963 order is this: Is it within reason to conclude that the hiring by Southern of those 223 men without regard for their ability to perform the work customarily performed by firemen or helpers, and under instruction to perform no work of that character, was a good-faith effort by Southern to comply with the order of May 29, 1963?

Is it possible to believe that anyone thought that hiring those 223 oldsters and instructing them to ride the fireman's seat but perform no services was actually compliance with the Court's order that "the defendants herein shall maintain the status quo with respect to their operation of locomotives and *the use of firemen thereon . . . by following the same procedures employed by defendants and maintaining the same working conditions as were maintained by the defendants in the employment and application of said Section 4 during the period 1950 to 1959*"?

Some explanation based on Southern's operating conditions or circumstances must be offered by Southern, or must be manifest in the record, if the conclusion is to be avoided that the hiring of the 223 men since June 28, 1963 was intended by Southern to be nothing more than a cynical gesture but actually a contemptuous repudiation of compliance with the Court's order.

There is a discernible reason why Southern elected in late June of 1963 to hire men approaching or past retirement age instead of hiring capable men to be firemen or helpers and potential engineers as it had consistently done theretofore. The reason is also understandable why Southern required the 223 men to sign plaintiff's Exhibit 2 (Tr. 266) as they were employed, in an attempt to prevent them from acquiring any tenure of employment under the firemen's collective agreement in the event the decision involved in No. 17891 were later reversed by an appellate court. (This is not an acknowledgment that such agreements are valid under the Railway Labor Act.)

Why did Southern employ elderly men, in their late sixties and as old as 78 years of age, instead of selecting men who would have been both physically and mentally more able to learn to perform the firemen's work and avoid personal accidents while getting on and off locomotives and while moving about the switching yards? Why did Southern abandon its established educational requirements and hire men without even a grade school education, and, in many instances, unable to read train orders or train bulletins or the book of operating rules? Why did Southern hire the 223 men without giving them physical examinations, particularly requiring them to pass normal color perception and hearing ability? Why did Southern instruct the 223 new employees not to perform any of the firemen's duties and to decline to comply with any order given by the engineer? Why did not Southern instruct the new employees to pass signals to the engineer, to look

for dangerous conditions on passing trains, and to perform such adjustments and mechanical tasks within their abilities as the engineer might request and instruct them to perform!

The evidence offered by Southern provides but one possible answer to these questions which has any relation to operating circumstances or conditions. This evidence consists of testimony given by Southern's executive vice-president, Edward M. Tolleson. This officer testified that between the years 1956 and 1959 Southern arrived at the decision that it could dispense with the firemen's services and eliminate him as a member of the crew by requiring the head brakeman to perform the signal passing and observation duties performed by the fireman and by foisting upon the engineer the work of putting supplies aboard the locomotive, checking the locomotive's mechanical and electrical equipment, and correcting the mechanical and electrical malfunctions that occur in the Diesel power units while the train is in transit (Tr. 213, 235-240).

If this is the reason why the 223 men hired since May 29, 1963 were hired without regard for their ability to perform the work performed by the firemen or helpers and were instructed to do nothing but sit on the fireman's seat, then it is the *same* reason previously offered by Southern in explanation of why it started operating locomotives late in 1959 without firemen. And if Southern's decision late in 1959 to begin operating locomotives without a fireman being a member of the crew was correctly held to be a violation of Section 2, Seventh, of Section 6, and of Section 5, First, of the Railway Labor Act, and if the Court's order of May 29, 1963, is a clear and unmistakable directive to Southern to cease violating the Railway Labor Act and to restore the working conditions of train and switching crews as they existed prior to 1959 by restoring the fireman as a working member of the crew, then we submit that the conclusion cannot be avoided that operating a locomotive with

one of the 223 new employees sitting on the fireman's seat is, for all practical and legal considerations, equivalent to having a bag of sand occupy the fireman's seat and is as clearly a violation of the May 29, 1963, order as is operating the locomotive without a bag of sand occupying the fireman's seat.

If instead of placing these unqualified men on the fireman's seat with instructions to do nothing, it had placed a bag of sand, labelled "fireman" or "helper", on the seat, it is probable that not even Southern would contend that such conduct would have been compliance with the Court's order. Yet the difference between such conduct and what Southern did is imperceptible. An unqualified person, with instructions to do nothing and doing nothing, is no more engaged in "the actual operation of trains," is no more engaged in "the use of firemen," and no more resembles the maintenance of "the same working conditions as were maintained . . . during the period 1950 to 1959," than would a bag of sand or a mannequin.

II. Any Right of Southern To Amend Its Operating Rules Could Not Give It the Right To Violate the Injunction or Any Provisions of Law

Three days after the order of May 29, 1963, became effective, requiring Southern to re-establish the *status quo* with respect to the employment of firemen on all locomotives "by following the same procedures employed by defendants and maintaining *the same working conditions* as were maintained by the defendants in the employment and application of said Section 4 during the period 1950 to 1959," Southern took steps to inform the employees comprising the firemen's craft that all rules contained in Southern's book of operating rules applicable to the work performed by firemen or helpers were cancelled forthwith. This action affected some 1,000 older firemen who had been hired during the years prior to 1959.

The effect of this cancellation of the operating rules was explained by Southern's Edward M. Tolleson on direct examination, as follows:

"Q. Can you tell the Court what the revision of rules contained in defendant's exhibit 1 was intended to accomplish?

"A. This was intended to eliminate duties of firemen in road, freight and yard service.

"Q. Mr. Tolleson, what were management's reasons for making the changes incorporated in defendant's exhibit one?

"A. We were of the opinion that our August 1956 rules with respect to the duties of road, freight and yard firemen, carried requirements that were in the nature of make-work rules. Because those duties could have easily have been performed by the head brakeman and the engineer.

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"Q. Mr. Tolleson, since the issuance of defendant's exhibit one and its promulgation and communication to all firemen employed by Southern, who to your knowledge is performing the duties formerly required of firemen under previous operating rules?

"A. To my knowledge the head brakeman and the engineers are performing the duties." (Tr. 212-213, 216)

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The cancellation on July 1, 1963, by Southern of the firemen's operating rules with the intention that firemen would cease performing their customary services as members of Southern's train and switching crews and that the firemen's work would thereafter be performed by the engineer and the head brakeman is a clear violation of the May 29, 1963, order.

Suppose that late in 1959, after Southern had arrived at the conclusion, as explained by Edward M. Tolleson, that it could dispense with the fireman as a member of its train and switching crews by imposing upon the engineer and

the head brakeman the services theretofore performed by the fireman, Southern, instead of simply starting to operate locomotives without firemen, had first issued orders throughout its system abolishing the operating rules applicable to firemen, just as it did on July 1, 1963. Thereafter, let us suppose, the thousand or more firemen employed by Southern rode the trains and switching locomotives like drones, performing no service and simply riding the fireman's seat. Let us suppose further the other facts to be as they in fact were between 1959 and 1963: the Diesel Agreement remained unchanged; Southern served upon the firemen's Brotherhood on September 16, 1960, the same Section 6 notice that it did in fact serve on that date; also, Southern invoked the services of the National Mediation Board on May 31, 1962; and then the Brotherhood instituted suit to obtain an injunction requiring Southern to cease violating Section 2, Seventh, Section 6 and Section 5, First, of the Railway Labor Act by resuming the employment of firemen or helpers, taken from the ranks of the firemen's craft, as members of Southern's train and switching crews until such time as the Diesel Agreement became modified, or a new interpretation achieved, in keeping with the requirements of the Railway Labor Act.

Would the issues presented by the facts we have posited differ in any material respect from the issues that were presented in the instant action? Would the *status quo* requirements of the Railway Labor Act be any less violated by Southern ordering its firemen to cease performing their normal duties and transferring those duties to other crafts while the Diesel Agreement remained unchanged, than was the case when Southern began operating its locomotives late in 1959 without a fireman being present and working as a member of the crew?

The answers to these questions cannot be in doubt. We think it clear that in both situations the working conditions of the train and engine crews, as those conditions are embodied in the Diesel Agreement and were maintained

over a period of many years, were altered by Southern without first effecting a change in the provisions of the Diesel Agreement or establishing a new and novel interpretation of the Diesel Agreement by the decision of some competent tribunal.

In each instance an injunction requiring Southern to reestablish and maintain the *status quo* is required by the provisions and the purposes of the Railway Labor Act, and in each instance the terms of the injunction may properly read precisely as does the District Court's order of May 29, 1963. In short, Southern's cancellation on July 1, 1963, of the operating rules applicable to firemen, with the intention that firemen should thereupon cease performing their accustomed services and requiring the engineers and the head brakemen to thereafter perform the firemen's work, can be viewed only as a clear, calculated violation of the order of May 29, 1963.

Whether the cancellation of the firemen's operating rules effective July 1, 1963, was an act prompted by bad faith or by a callous indifference to the law and the authority of the Federal judiciary can be measured to a large extent by the timing of the act and by the existence or non-existence of a reasonable operating justification for such action.

Southern's executive vice-president, Edward M. Tolleson, testified that Southern reached the conclusion by 1959 (as did the other railroads of the country) that it could get along without the services of firemen by transferring their duties to the engineers and the head brakemen (Tr. 243). When asked on cross-examination why Southern did not at that time act to put its conclusion into effect by cancelling the firemen's operating rules, the answer he gave was as follows:

"Because there was no real business reason to do it. We had these men that we were going to have to continue to pay. We were not going to get rid of those firemen. So that there was no real pressing need that

we change these rules. That didn't occur until we had to hire these new men." (Tr. 243)

Mr. Tolleson was then questioned why there was need to terminate all firemen's services by the cancellation of the operating rules at the time that the 223 new employees were hired beginning June 28, 1963. His explanation went as follows:

"Q. What was there about the necessity of hiring these new men that made it a sounder business judgment on July 1, 1963 than it would have been earlier?

"A. Because it was imperative that the fellows understand thoroughly then what was expected of them or not expected of them.

"Q. Why didn't you limit the application of your old rules to the new rules? (sic)

"A. Because they were all firemen so far as we saw it, and we wanted the rules to apply certainly as to the lack of responsibility to all firemen.

"Q. As I understand you, you thought between 1959 and 1963 since you had these men anyway, you may as well get use from them?

"A. We couldn't get rid of them. They were doing no actual harm. We had to pay them.

"Q. And you thought you might as well get something for what you were paying; is that right?

"A. Whatever they were able to produce that was of any benefit. Certainly there was no reason why we should change the rules at that time.

"Q. Why did within two days after the effect of this Court's order it suddenly become useful (sic) to get something for the pay you were giving?

"A. It didn't become necessary so far as that was concerned. We said that what they were doing could be done by the head brakeman and engineer.

"Q. Why do you find it now a sound business judgment and not a sound business judgment earlier not to get something for the money you were paying?

"A. It is just as sound a business judgment in our opinion, or it was when we changed the rules, to require, to actually require no more of these new men than we would have of the old. There was no point of making fish of one and fowl of the other.

"Q. Is there no point of getting something for your money?

"A. We certainly, so far as the need of the firemen are concerned, we don't think there is anything actually that they can produce for their money. But we are not permitted to get rid of them.

"Q. Well, are they producing any less now than in 1959?

"A. They are not producing any more.

"Q. Are they producing any less?

"A. I would say they are producing practically nil, or nothing.

"Q. Well I thought you continued the old rule in effect after you concluded the firemen were useless to get something for your money.

"A. If I said it that way, I certainly didn't intend that they were performing any useful duty that we couldn't do without.

"Q. Then, why did you not issue this prior to two days after the effective date of the Court's order?

"A. There was no pressing need to change the rules at that time.

"Q. How did the pressing need arise on July first?

"A. Because we had some two hundred new men who had to be instructed what to do, if anything.

"Q. And how many old firemen did you have at that time?

"A. We had a great number. I don't recall the exact number.

"Q. Is it about twelve hundred?

"A. Somewhere in that neighborhood, I would say.

"Q. Wasn't it to make this Court's order look foolish?

"A. Indeed not, sir. We had no thought that we were making anything look foolish.

"Q. In hiring these two hundred twenty three men, why didn't you try to get the best men you could who could perform some service?

"A. We didn't have the idea that they were going to perform any real service; that there was no real need for them.

"Q. I am not talking about 'need,' Mr. Tolleson. I am talking about what they could do that would be useful, such as observing a passing signal?

"A. We didn't think that the firemen we had need be continued for that purpose, as I have testified. They had brakemen and the engineer who could take care of that situation very nicely.

"Q. But so far as the firemen between 1959 and '63 did observe the signals, that was some contribution, was it not?

"A. I couldn't be too sure. It just depends on what the situation was, whether or not it was a contribution.

"Q. In some situations would it be a contribution?

"A. I am not prepared to answer that. I wouldn't think so.

"Q. Well, could the old firemen at least correct some malfunctions to at least keep the train running, could they not?

"A. Not in my opinion. We had to do certain things about an engine to keep firemen, for instance sealing up the high voltage to keep them out because of the damage they might do for that matter." Tr. 244-48.

Mr. Tolleson, it will be observed, contradicted his earlier explanation of why the operating rules were *not* changed in 1959. His first explanation was that since Southern could not peremptorily get rid of its thousand or more trained firemen, Southern felt that it might as well get some return from the firemen for the wages being paid them. This return consisted of the services customarily performed by the firemen.

But when Mr. Tolleson was pressed on cross-examination to explain why the date of July 1, 1963, was selected as the time to cancel the operating rules he took refuge in the inconsistent position of asserting that Southern was of the opinion that having the old firemen continue performing their accustomed work was a factor of no value to Southern.

Mr. Tolleson was questioned about this incredible and contradictory statement that requiring the old firemen to continue performing their customary services after July 1,

1963, was a matter of no value or concern to Southern. He was asked whether he believed a fireman would be performing a service of value to Southern by correcting malfunctions in the Diesel power units while the freight train is in motion, thereby avoiding the necessity of stopping heavy freight trains on the main track while the engineer goes back into the Diesel power units to hunt for and correct the malfunction.* This colloquy with Mr. Tolleson went as follows:

"Q. Couldn't a fireman replace a fuse or correct a short circuit?

"A. Yes, and so could an engineer.

"Q. The engineer would have to stop the train to do it?

"A. He couldn't leave his post of duty while the train was in motion.

"Q. And to stop the train, a long freight train to stock a fuse involves a loss of time and considerable expense, does it not?

"A. We don't consider it so, no.

"Q. It costs something, doesn't it, Mr. Tolleson?

"A. Mr. Kramer, we have had many cases where firemen many, many cases where we had to stop and have that done and had to get shop people to do it for that matter.

"Q. But with a fireman, the necessity for stopping is less frequent, is it not?

"A. I don't think so." Tr. 248.

We thus have the chief executive vice-president of a large railroad telling the court that it is a matter of no consequence to the railroad, either financially or as a matter of safe train operation, that a freight train, which may vary from a half mile in length to 300 cars or three miles in length, must be stopped while in transit and on the main track so that the engineer may correct malfunc-

* Vice President R. L. McCollum testified during the hearing on the contempt citation that numerous kinds of mechanical and electrical malfunctions do occur in the Diesel power units which can be located only while the train is in motion and the power units operating.

tions in the Diesel power units! This statement is so patently nonsensical that it emphasizes the lack of candor and sincerity of the appellees throughout all these proceedings.

As for Mr. Tolleson's statement that Southern was compelled to terminate the obligation of performance of services by the thousand or more experienced firemen on and after July 1, 1963, "because we had two hundred new men who had to be instructed what to do, if anything" (Tr. 245), this statement is a flat contradiction of the facts established by the stipulation.

The fact is that the 223 new men were individually instructed when hired that they were to perform no services. We quote from paragraph 14 of the stipulation:

"The men referred to in paragraph 7 were verbally told upon being hired by Southern that when employed they would have no duties to perform on diesel locomotives in road freight and yard service, other than to sit in the fireman's seat and these instructions have been complied with."

Moreover, the 223 men hired after June 28, 1963, are a group apart from the thousand or more earlier-employed firemen. These two groups of employees differ in virtually every essential respect, except that both groups are placed on the seniority rosters of the firemen's craft. We fail to see any necessary connection whatsoever between the employment of the 223 new employees and the decision dictated by the President of Southern (Tr. 263) that the older firemen should be instructed by bulletin on July 1, 1963, that henceforth no more services would be required of them and in the future they could ride the locomotives not as members of the crew but as nonentities.

We submit that the only plausible conclusion one can draw from the record is that this act was timed and moti-

vated by a desire to make the injunction order appear ridiculous to its employees and to the country at large.*

If Southern's cancellation of all firemen duties had been the result of technological developments making the performance of the firemen's duties no longer necessary, there might be some argument made in defense of such cancellation. But there have been no such technological developments on the Southern or elsewhere. The fireman issue is not whether there are essential services for a fireman or helper to perform, but rather who shall perform these essential services heretofore performed by firemen.

The Report made to the President by the Emergency Board appointed by Executive Order 11101, dated April 3, 1963, concerning the work rules dispute between the five transportation brotherhoods and the Class I carriers of the country, excluding the Southern Railway, makes this plain. Mr. Samuel I. Rosenman was chairman of that Board. The report "The Firemen's Issue—The Job and the Individual" begins at page 4 of the Board's report. The first three paragraphs read as follows:

"The National Diesel Agreement of 1937 established the basis for employment of a fireman on passenger and road freight and yard diesel operations. ('Diesel' is used here to mean 'other than steam.') That agreement has been continued through a succession of national negotiations. * * *

"It is important to understand the real nature of the dispute on this issue. The carriers have always accepted the continued use of firemen on passenger diesel operations, where there are now only two men

* Because of the fact that what a judge knows as a man he also knows as a judge, we invite attention to a leading article regarding the Southern Railway System appearing in the September 1963 issue of *Fortune Magazine*. This article contains a subtitle, "The Fireless Fireman" (p. 202) which is a portrayal of Southern's singular and high-handed approach to labor problems. "Courts may judicially notice much which they cannot be required to notice." Thayer, "Judicial Notice and the Law of Evidence," 3 *Harvard Law Rev.* 285, 310.

in the cab. Also, they do not contend that the bulk of the work performed by firemen on freight diesels is not needed—left-hand lookout, the communication of signals to the engineer, and the detection and correction of locomotive malfunctions. They contend only that such work can be combined with other work performed by employees in other classifications, and that, in the interest of economy, the job of fireman as such can be dispensed with entirely, without impairing safety or unduly burdening other employees. They believe that two rather than three men can adequately handle all of the work in the cab except under very unusual circumstances.

“On the other hand, the brotherhoods do not contend that there are no jobs presently occupied by firemen which cannot be abolished. As a matter of fact, just as the carriers, being realists, have suggested that there may be a few freight situations in which the services of a fireman are needed, so the firemen have implied that there may be some significant number of jobs on daylight yard and branch-line freight diesels which can be eliminated.”

The issue at the national level as to what specific employees among the members comprising the train and switching crews shall in the future perform the services now being performed by the fireman or helper, is now being resolved for all the other railroads of the country pursuant to the procedures of the Railway Labor Act and special Congressional legislation. See No. 17891. And until it is resolved and put at rest, the Brotherhood has no alternative but to do all that lies within its power to prevent Southern from demonstrating to the other railroad managements of the country that adherence to the orderly procedures of the law in seeking a solution to the work rules dispute is a route to be followed only by the meek and the cowardly, the docile and the obtuse.

The power of railroad management to change operating rules can be abused by using it to achieve unlawful ends just as readily as it can be used to achieve legitimate ends.

In this instance the Southern has clearly used this power to achieve an unlawful purpose. That unlawful purpose, in addition to flouting the injunction, is to arbitrarily take from the firemen's craft the work which they have consistently performed since the advent of the Diesel locomotive and transfer such work to other crafts while the firemen's collective agreements continue in effect and the members of the firemen's craft continue to be employees of Southern.

The use by Southern of its power to promulgate and annul operating rules to achieve the purpose of taking from the firemen's craft all the work which it was employed to perform and imposing that work upon the trainmen's craft and the engineers' craft was, we submit, as clearly contrary to the purpose and reason which called forth the injunction of May 29, 1963, as such action would have been violative of the employment rights of the firemen's craft had Southern used this power in 1959 to accomplish this purpose instead of using the method which it initiated at that time, to wit, sending out trains and switching locomotives without a fireman being a member of the crew.

We put these questions: Could any act by an employer be more likely to provoke a labor dispute and precipitate resort by employees to their only effective method of retaliation, their strike power? Could the peremptory transfer by an employer of work from one craft of employees to another craft be thought of in any other way than as an act violative of the principles and the procedures upon which the Federal labor policy is predicated? Could anyone seriously doubt that an act of this nature strikes a blow at the integrity of collective agreements and makes light of the admonishment in Section 2, First, of the Railway Labor Act that carriers and their employees shall "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions"?

If taking from one craft of employees the work it has always performed and transferring that work to other crafts while the collective agreement under which the former craft was employed continues in effect could be supported by at least plausible argument, it would be reasonable to anticipate that this measure would have been frequently attempted by employers and that much litigation over the propriety of such action would have resulted. However, intensive research has turned up only two prior instances in which management has undertaken to eliminate a craft or a collective bargaining unit of employees by the simple device of transferring their work to another craft and leaving the former without purpose or justification for continued existence.

The cases disclose that employers have occasionally taken from a craft of employees work customarily performed by the craft and made arrangements to have the work performed by employees of independent contractors, but even such moves have generally been condemned by the courts on the ground that such action is inconsistent with the premise upon which the collective agreement entered into by the employer and the craft representative is assumed to rest. As an illustration of this kind of case, we invite attention to *International Union, U.A.W., Local 391 v. Webster Electric Co.*, 299 F. 2d 195 (7th Cir. 1962). In that case the District Court held that the defendant had violated its obligations under the collective agreement by contracting out all the work of a craft. This judgment was affirmed by the Court of Appeals for the Seventh Circuit. The Court arrived at its decision by the following reasoning:*

“Plaintiff and defendant have an agreement which, while it is in effect, fixes the rights of each against the other. Any right not effectually asserted by either in negotiations leading to the execution of the agreement cannot now be insisted upon during the stated life of

* Cases in which apparently contrary decision were reached are collected in 57 A.L.R. 2d 1394.

the agreement if it be inconsistent with the purpose and scope of that document. There is no express prohibition of contracting out to be found in the agreement. But for the agreement, defendant would have that right, as an incident of management. However, there is an agreement providing for a union shop. The employees covered by that agreement are described as *all* defendant's employees, with certain irrelevant exceptions. This classification includes the office janitorial employees. Thus they are required to be members of plaintiff union. If they were to be excluded the agreement should have said so. By including them, the contracting parties in effect negatived any intention to treat them differently from other employees. The fact that they are but three in number does not distinguish their job rights from those of their more numerous union brothers. If this small group can be thus replaced, then other groups could meet the same fate, and eventually it would be inconsistent with the basic purpose of the agreement to approve the contracting out of the janitorial jobs here involved.

Another case illustrating the extent to which courts have gone in preventing management from using its managerial powers to defeat the contractual rights of employees are the decisions in *United Steelworkers, Local 4264, v. New Park Mining Co.*, 169 F. Supp. 107 (1958), 273 F. 2d 352 (1959). In that case the Court of Appeals explained the applicable law as follows:

"This brings us directly to the question whether the shifting of the mining operations under an employer-employee relationship to one of the lessor-lessee as characterized by the so-called leasing agreements, was in violation of the collective bargaining agreement. No one can doubt the inherent right of the employer to quit business without prejudice to the bargaining contract. . . .

"And so, there is good authority for saying that whether the Company actually quit business or merely decided to subcontract its work by a leasing arrangement, it had the absolute right to do so, even though its action brought the contract to an end before its expira-

tion date. But we think this construction of a collective bargaining contract ignores the covenant of good faith and fair dealings which must inhere in every collective bargaining contract if it is to serve its institutional purposes.

"In most instances, where the parties have committed the interpretation and application of their bargaining contract to the arbitral process, the arbitrators have interpreted the contracts to exclude subcontracting of work usually performed by employees on the premises in the absence of an agreement to that effect. And, contracts have been so interpreted in the face of restrictive management function provisions.

• • • "

We now invite the Court's attention to the two cases, both railroad cases involving the same railroad, in which railroad management sought to achieve the same end that Southern has sought to achieve in the course of the instant litigation. One such case was decided by the United States District Court for the Northern District of Texas. *Railroad Yardmasters of America v. St. Louis-San Francisco and Texas Railway Co.*, 218 F. Supp. 193 (1963).

The St. Louis-San Francisco undertook to eliminate the craft of yardmasters by transferring their duties to other employees. The District Court enjoined the railroad from putting its plan to abolish the classification of yardmaster by transferring their work to other crafts into effect until such time as the procedures prescribed by the Railway Labor Act had been complied with. The consideration upon which this judgment was based is explained by the court as follows:

"In the present case, the Railroad's admitted plan is to get rid of the yardmaster classification in its terminal at Fort Worth, the city where its home office is located. It concedes that such contemplated action is not based upon lack of need for performance of the duties of yardmaster as they now exist, or upon any decrease in volume of traffic, present or anticipated. Such of the duties of yardmaster as have been left,

after the advent of automation some time ago, will be parcelled out among the Railroad's employees in Fort Worth outside the bargaining unit represented by the plaintiff union. In other words, if the plan is carried out, the work heretofore done by the yardmasters and the volume of traffic will still be there, but the yardmasters will not. * * * The bargaining agreement certainly contemplated that the work theretofore performed by yardmasters would continue to be done by them as long as it existed. * * *

The motive behind the St. Louis-San Francisco action which led to the yardmasters' case is precisely the same motive that actuated the Southern on July 1, 1963. That motive was to eliminate the need for a craft of employees by transferring their work to other crafts. This is precisely the reason why Southern's action on July 1, 1963, is unlawful action toward the firemen's craft. It, too, destroyed the basic assumption upon which the Diesel agreement and the firemen's schedule agreement were founded.*

If this conclusion is sound, and we submit that it is, the question that it leads to is this: Does the fact that Southern undertook to accomplish its purpose by the method of cancelling the firemen's operating rules, instead of pursuing the method selected by St. Louis-San Francisco, alter the *legal effect* of Southern's action? The answer must obviously be in the negative. There is no magic in the process of promulgating and cancelling operating rules by *ex parte* action.

We invite the Court's attention to the other decision holding that an employer may not abolish a craft of its

* Although the decision of the District Court was reversed by the Court of Appeals for the Fifth Circuit on March 5, 1964, the reversal was not on any grounds inconsistent with the foregoing but was predicated entirely on the fact that the collective bargaining agreement contained a provision, not present in this case, that was argued by the carrier to mean, and on its face apparently meant, that the carrier had the right to abolish all yardmaster positions, and hence the dispute was over the proper reasonable interpretation of the agreement and thus for the Adjustment Board.

employees by transferring all its work to other crafts of its employees. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). In that case the St. Louis-San Francisco Railway was about to transfer work performed by a class of employees known as train porters to the trainmen's craft as a result of persuasive influence brought to bear by the Brotherhood of Railroad Trainmen upon the management. The Supreme Court condemned the carrier's cavalier disregard of the employment rights of the train porters craft, and ordered the carrier and the Brotherhood of Railroad Trainmen to refrain from carrying out their plans to deprive the train porters of their work. The District Court and the Court of Appeals had each held that the proposed transfer of work would violate Section 2, Seventh, and Section 6 of the Railway Labor Act. 72 F. Supp. 695; 191 F. 2d 442. The Supreme Court did not think it necessary to consider this question. 343 U.S. 768, at 772.

The *Howard* case, is of course, customarily cited as a racial discrimination case. We think it evident, however, that the doctrine of the *Howard* decision is not limited to protecting the work belonging to a craft of employees of one race from being peremptorily transferred to another craft of a different race. We think the same result would have been reached had both crafts been white or both crafts colored and the transfer of work from one craft to another had come about as a result of the carrier yielding to the stronger force.

We respectfully submit that the law as declared and enforced by the cases referred to above is sound law. We submit that the action of Southern Railway on July 1, 1963, putting into effect its prior determination that from that time forward no work would be expected or received from the members of the firemen's craft, and thereafter the craft of brakemen and the craft of engineers would be expected to perform what had been the firemen's work, was clearly unlawful action. And the unlawfulness of such

treatment of the firemen's craft is not mitigated in the slightest respect by the fact that it was accomplished by the process of Southern simply promulgating changes in its operating rules.

If we are correct in believing that Southern's action on July 1, 1963, was a violation, under existing law, of the right of the firemen's craft to continue performing the work and the duties firemen have been performing under the firemen's collective agreements since the advent of the diesel locomotive, then we submit that such action must necessarily be a violation of the order of May 29, 1963.

III. The Contempt by Appellees Is Both Criminal and Civil Criminal Contempt

There is probably no better authority regarding the purposes to be served by, and the considerations to be weighed in the course of, criminal contempt proceedings than the comments by the Supreme Court in the famous case of *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). We quote as follows:

"Sentences for criminal contempt or punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Buck's Stove & Range Co.*, supra, 221 U.S. at page 441, 31 S. Ct. at page 498, 53 L. Ed. 797, 34 L.R.A., N.S. 874. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." (330 U.S. 258, at 302)

In view of the preceding portion of this brief, this Court needs no suggestions from counsel as to whether the authority of the District Court has been defied and its dignity impugned by the appellees.

Civil Contempt

The Supreme Court discussed the purpose of civil contempt proceedings in the *United Mine Workers* case, as follows:

"... Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. *Gompers v. Buck's Stove & Range Co.*, supra, 221 U.S. at pages 448, 449, 31 S. Ct. at pages 500, 501, 55 L.Ed. 797, 34 L.R.A., N.S., 874. Where compensation is intended, a fine is imposed, payable to the complainant.

.

"But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and the magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

"It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." (330 U.S. 258, at 303)

The Brotherhood initiated the instant contempt proceeding because of the belief that an evil precedent for labor relations in the railway industry will have been established if Southern can demonstrate to other railroad managements that its ruthless disregard of the procedures prescribed by the Railway Labor Act pays off. It

was for precisely this same reason that plaintiff came to Court in the first instance seeking judicial enforcement of the *status quo* requirements prescribed by the Railway Labor Act. Southern alone of all the Class I railroads in the United States has pursued a maverick course in contending with the question whether the services performed by the firemen are to be imposed upon other members of the train and switching crews and thereafter the engineer shall be the only trained and experienced engineman among the members of the crew.

IV. The Brotherhood's Acceptance of the New Men Into Membership Does Not Preclude It from Charging Appellee With Contempt

We have argued above that placing an unqualified person on the fireman's seat with instructions to render no services was no more compliance with the District Court's injunctive order than there would have been had Southern placed a bag of sand on the fireman's seat. In the Court's Memorandum and Order of November 6, 1963 denying plaintiff's motion for judgment of contempt, the Court below observed that the Brotherhood was not in a position to make such argument because it had solicited the new men for membership and the Brotherhood's Constitution limits membership to an applicant "actually employed as a locomotive fireman (helper) * * * ." The Court below was simply mistaken.

Section 30 of Article 8 of the Constitution, after setting forth the crafts in which an applicant must "be actually employed" to be eligible for membership, continues with "or holding seniority rights as such". Thus not only firemen, hostlers, etc. "actually employed" as such are eligible for membership, but persons "holding seniority as such" are eligible for membership. Southern, by hiring these men and placing them on the payroll and seniority roster as firemen has given them "seniority as such", and the fact that the Brotherhood has accepted them as mem-

bers does not preclude it from showing that the effect of what Southern has done is no more compliance with the District Court's injunction than placing a bag of sand on the firemen's seat would have been compliance with the order that "the defendants herein shall maintain the *status quo* with respect to their operation of locomotives and the use of firemen thereon."

Assuredly, placing a bag of sand on the firemen's seat would not have been compliance with the Court's order. What Southern has done is no more compliance.

CONCLUSION

The decision below should be reversed and the case remanded to the District Court with instructions to assess against appellees the remedy for civil contempt and to impose a penalty for criminal contempt.

Respectfully submitted,

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BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,405

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Appellant,

—V.—

SOUTHERN RAILWAY COMPANY, *et al.*,

Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Statement of Questions Presented

In the opinion of appellees, the questions are:

1. Did the District Court so clearly exceed its powers in construing its own decree and so plainly err in appraising the evidence presented at the hearing as to warrant reversal of its order dismissing appellant's motion for a judgment of civil and criminal contempt?

2. Does this Court have the power to review a District Court's judgment denying a motion to punish for criminal contempt?

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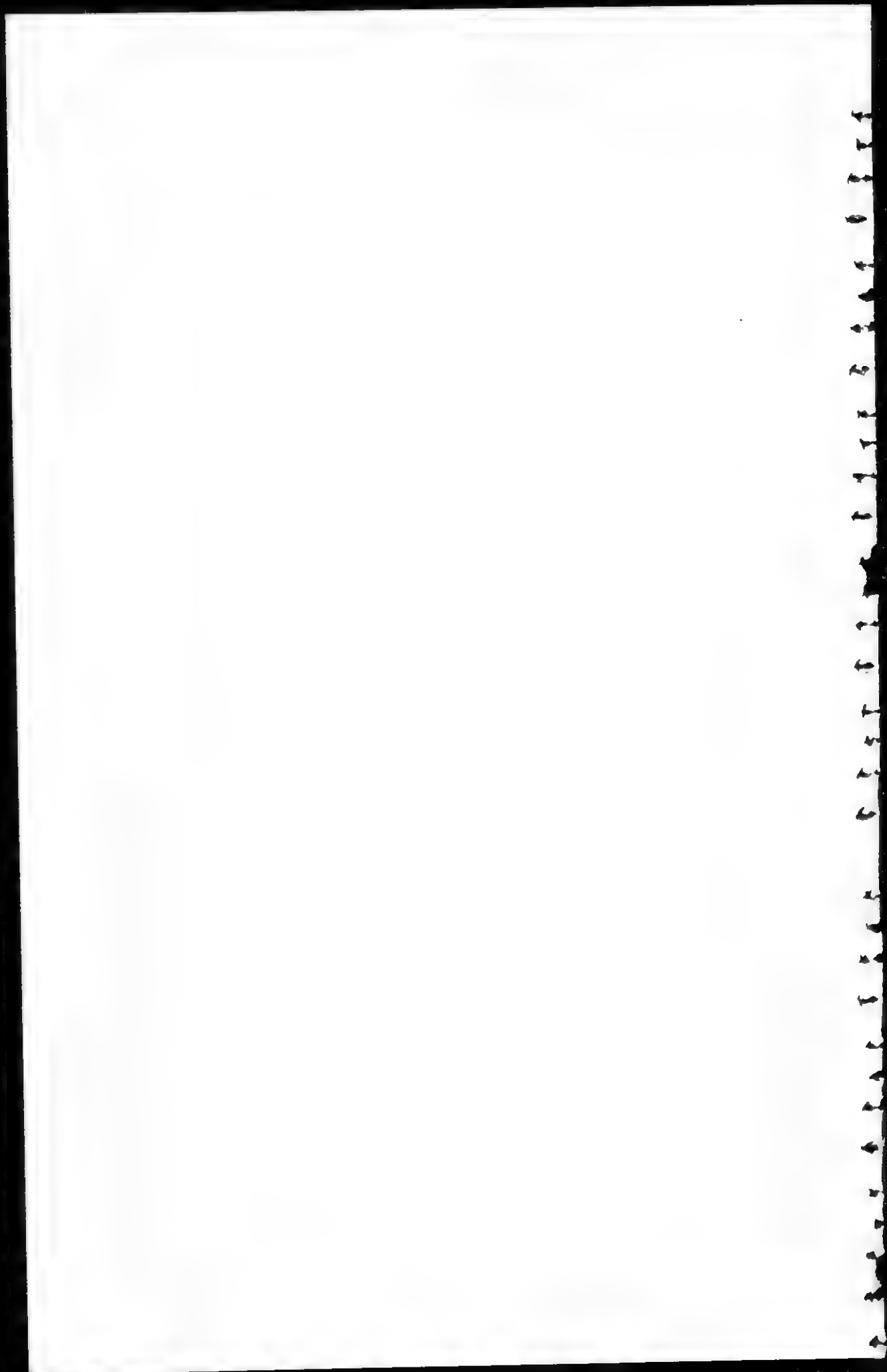
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,405

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant,

—v.—

SOUTHERN RAILWAY COMPANY, *et al.*,
Appellees.

BRIEF FOR APPELLEES

Counter-Statement of the Case

This is an appeal from an order issued by Judge Leonard P. Walsh denying the Brotherhood's motion to hold Southern in civil and criminal contempt for violating the injunction issued by him on May 29, 1963 in Civil Action No. 2881-62, No. 17891 in this Court.

Although the District Court held that no contempt had been established and, in fact, termed Southern's conduct " . . . a remarkable effort to comply with the Order", the Brotherhood would have this Court find a willful and deliberate violation of that decree. It urges that this Court so conclude by deciding *de novo* the meaning and effect of Judge Walsh's order and the weight to be accorded the evidence adduced below. This argument, which ignores the most basic canons governing appellate review, is premised on unsubstantiated charges and events torn from context or otherwise distorted.

Statement of Facts

The case in chief arose out of a dispute between the parties concerning interpretation and application of Section 4 of the Diesel Agreement, which provides:

"A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives * * *." (J.A. 416)*

As early as July 1959, and even before that, Southern took the position that this clause did not require it to employ new hires in order to run all of its trains and engines with a fireman assigned (J.A. 163-65, 267-69, 295-97, 341). Southern asserted that the provision required merely employment of men who already had established firemen's seniority to fill available assignments (see, e.g., J.A. 271). As men with established seniority retired, quit or were transferred or otherwise terminated, an increasing number of trains and engines were run without a fireman assigned (J.A. 267-94).

On September 10, 1962, the Brotherhood brought suit in the District Court asserting that Southern's application of its interpretation of Section 4 of the Diesel Agreement was a repudiation of contract and a change in working

* "J.A." refers to the Joint Appendix in Case No. 17891 which has been made a part of the record on this appeal by order of the Court. Citations to the record of the contempt proceeding, which has not yet been printed, will be to the original record, as follows:

"D. Ex."—Defendants' exhibit;
 "P. Ex."—Plaintiff's exhibit;
 "R."—Transcript;
 "Stip."—Prehearing stipulation;
 "Mem. & O."—Memorandum and Order of the District Court;
 "McCollum Aff."—Affidavit of R. L. McCollum in support of the Brotherhood's motion.

conditions which violated the Railway Labor Act (J.A. 5-6). An injunction was sought to require Southern to comply with the statute (J.A. 6).

Southern argued before the District Court that the root issue—the meaning and effect of Section 4—was a “minor” dispute under the Railway Labor Act and that the Brotherhood’s claim for relief fell within the primary and exclusive administrative jurisdiction of the National Railroad Adjustment Board before whom the Section 4 dispute was then pending (J.A. 7-17, 26-27).

Although the District Court ruled the controversy over Section 4 to be a “minor” dispute that was for the Adjustment Board (J.A. 468-69), it issued an injunction to maintain the status quo until the National Railroad Adjustment Board acted, or until the contract between the parties was altered in negotiations under the Railway Labor Act (J.A. 477-78). Finding that Southern had, during the period 1950 to 1959, run its trains with firemen assigned (J.A. 470), the court on May 29, 1963, ordered that this assignment practice be restored. The order gave Southern 30 days (until June 28, 1963) to notify its furloughed firemen of employment opportunities “ * * * or to hire new firemen and helpers, and to operate [its] lines in accordance with Section 4 of the Diesel Agreement as interpreted prior to July of 1959” (J.A. 478).

On May 31, 1963, the District Court denied Southern’s motion for a stay pending appeal. On June 21, 1963, this Court denied a like application and, on June 28, 1963, a stay was denied by the Chief Justice of the United States (Stip. par. 4).

Between June 28, 1963 and September 1, 1963, Southern operated more than 42,000 train and engine assignments (Stip. par. 1, Mem. & O. p. 6). On only 47 of these occa-

sions (about one-tenth of one per cent) was a fireman not assigned. Thirty-five of these 47 incidents occurred between June 28 and June 30; only one occurred after July 16, and there were none after August 19 (Stip. Ex. A, Mem. & O. p. 6).

In making this "remarkable effort to comply" (Mem. & O. p. 6), Southern employed 223 new men over the age of 55 (196 of whom were between the ages of 58 and 68), and assigned them in road freight and yard service (Stip. par. 8 and Ex. G thereto). A number of the carriers' self-imposed pre-employment qualifications and procedures were waived when it hired these people. They were not subjected to physical examinations; were not required to familiarize themselves, at their own expense, with line of road or operating procedures; and were not required to own a standard watch (Stip. pars. 11-13, 15). Although these men were hired at more advanced ages than the ages at which most of Southern's firemen had previously been hired (Stip. par. 10), they were no older, when hired, than are many of Southern's other firemen with long established seniority, 739 of whom were between the ages of 60 and 81 as of July 1, 1962 (Stip. par. 9 and Ex. H thereto).

On July 1, 1963, Southern revised its self-established operating rules to eliminate redundant road freight and yard duties of firemen—duties which were also being performed by head brakemen and engineers (R. 213, 224-25, D. Ex. 1). These new operating rules were issued verbally to the new hires and, in accordance with custom, were posted on all bulletin boards. They were applicable to *all* firemen, regardless of when hired (R. 116, 216). As a result of these operating rules changes, no fireman in road freight or yard service was required to perform any operating duties (R. 217).

On August 12, 1963, on the basis of an affidavit furnished by R. L. McCollum, its Vice President and former General Chairman on Southern's lines, the Brotherhood moved to have Southern adjudged in civil and criminal contempt, relying on:

1. A claim that 28 trains and engines had been contemptuously run without a fireman assigned (pp. 2-3);
2. An inaccurate assertion that Southern had failed to hire sufficient people to comply with the Court's order (only "90" new men instead of the 223 actually hired) (p. 4);
3. An irresponsible charge that some of the new hires were "illiterate", "feeble", "color blind", disabled or perhaps worse (*ibid.*);
4. An unfounded claim that Southern had rejected the employment applications of "qualified, experienced" people (*id.* at p. 6);
5. A half truth that the new hires (as opposed to both the new hires *and* long service firemen) had been instructed to perform no operating duties (*ibid.*); and
6. A suggestion that the court's order somehow entitled the Brotherhood to application of the same pre-employment qualifications (concerning particularly age, physical examinations and standards and education) as those applied by Southern during 1950-1959 (*id.* at pp. 4-5).

Neither the facts stipulated prior to the hearing, nor those developed in open court, gave any support to the Brotherhood's assertions. Those facts established:

First, Southern's record of 47 non-assignments out of a total of more than 42,000 train and switching assignments

(Stip. par. 1), was held by the court " . . . hardly to amount to willful and deliberate defiance, but, . . . [rather] a remarkable effort to comply with the Order" (Mem. & O. p. 6). The court thus concluded that "[t]hese few instances [did] not amount to contempt" and ruled " . . . that there ha[d] been a substantial compliance in good faith." (*Ibid.*)

Second, it was stipulated prior to the hearing that Southern put 10 furloughed firemen back to work; added 72 men holding firemen's seniority on the Central of Georgia Railway to the firemen's ranks on Southern when Southern acquired that carrier; and that Southern also hired 223 new employees who were placed on the seniority roster of the Brotherhood (Stip. pars. 5-7). Southern thus hired more than three times as many employees as the "90" sworn to by the Brotherhood's Vice President in its moving affidavit (see p. 5, *supra*). Moreover, the District Court noted that "[g]ood faith on the part of the railroad [was] further demonstrated by the fact that" the number of new employees Southern actually hired was " . . . far in excess of the number anticipated" (Mem. & O. p. 6).

Third, there was nothing offered to prove that any of Southern's new hires were illiterate, feeble, color blind or disabled (McCollum Aff. p. 4). Certainly, the new firemen called to testify by Southern, people representative of the group, were not so handicapped. Moreover, Southern proved that the Brotherhood considered these new hires sufficiently qualified to be admitted into membership in the Brotherhood under the provisions of its constitution (R. 102-8, 120-21, 167-94).

Fourth, no attempt was made to prove the assertion that Southern had rejected applications for employment from men with experience on either Southern or any other railroad (McCollum Aff. p. 5).

Fifth, it was established beyond dispute (R. 213, 224-25) that the changes in Southern's operating rules that eliminated the operating duties of firemen were announced and applicable to all firemen, old and new alike. But beyond this, Southern proved, the Brotherhood conceded, and the District Court found, that Southern's operating " . . . rules have not been the subject of collective bargaining between the parties; and, further, that the rules ha[d] been changed on prior occasions without consultation with the Brotherhood" (Mem. & O. p. 4; see also, R. 201-4, 216, 218, 249-58, D. Exs. 6-8). Moreover, Southern was not the first railroad to eliminate the redundant duties of firemen specified in its operating rules, the Chesapeake & Ohio having done so as early as 1958 (R. 267-69, D. Exs. 9-10).

On the basis of these facts, the District Court held that Southern's operating rules, which were neither in issue nor in evidence in the case in chief, " . . . were, and remain, the sole responsibility of management" (Mem. & O. p. 5). As the District Court noted: "To now expand [my] order to include rules as well as conditions would be an unwarranted interference with the functions of management." (*Ibid.*)

Sixth, the Brotherhood's assertions concerning pre-employment qualifications were disposed of by the concessions which it made in the pre-trial stipulation, paragraph 15 of which states:

"The following matters are not embodied in the collective bargaining agreement in effect between the parties and have not been subjects for collective bargaining between them:

- A. Physical examinations and standards for new hires;
- B. Age of new hires; and
- C. Educational level of new hires."

Because the court's order was directed solely to matters " . . . which had been the subject of collective bargaining" (Mem. & O. p. 4), these pre-employment qualifications were held to be outside its scope. Further, on the subject of age, the court held that Southern, in the exercise of its business judgment, could hire older people in order to benefit more rapidly from attrition—the most likely solution for the fireman manning problem (Mem. & O. p. 5).

Finally, the District Court pointed out that the Brotherhood was " . . . in the untenable position of arguing that these new men [were] not actually employed as firemen, while, at the same time actively soliciting them for membership in [its] union. This is particularly significant in the light of the fact that the Brotherhood's constitution states that an applicant for membership must be, 'actually employed as a locomotive fireman (helper) . . .'" (Mem. & O. pp. 5-6; see Point III, *infra*.)

On the basis of these facts, it is apparent that the record amply justified the court's conclusion that "[n]o contempt had been established" (Mem. & O. p. 7). As we shall demonstrate in the Argument which follows, there is no basis for overturning that conclusion.

Summary of Argument

I. This Court may not review that portion of the District Court's order denying a judgment of criminal contempt. The Brotherhood's motion was the equivalent of an information and gave rise to a criminal proceeding within the meaning of the Federal Code of Criminal Procedure. Only the Government may appeal the denial of such a motion and it is not a party to this appeal.

II. The District Court's order denying the Brotherhood's motion for a contempt judgment was based on that

court's interpretation of its own status quo injunction and its appraisal of the evidence presented at the hearing on the motion for contempt. This judgment should not be disturbed unless it can be shown that the District Court clearly exceeded its power in construing its own decree and plainly erred in appraising the evidence presented to it. This Court should not disregard the considered determination of the District Court nor may it substitute its judgment on issues of fact for that of the court below. This principle is particularly significant here, where the matters ruled on were so peculiarly within the competence of the District Judge; for it was the meaning and effect of his own order and its application to a precise set of facts which were in issue.

Regardless of what standard may be applied on this most unusual appeal, the record compels affirmance of the District Court's order. Pre-employment qualifications and the duties of firemen were not before the court in the case in chief and were outside the scope of its injunction. In any event, Southern had the right to set and to change pre-employment qualifications for new employees and to revise its operating rules governing what duties, if any, firemen are to perform. This right existed in 1950-59 and was not affected by the District Court's status quo injunction. Neither pre-employment qualifications nor the carriers' operating rules have ever been the subject of collective bargaining, and they were properly held by the District Court to be the sole responsibility of management.

III. Finally, there was no showing that Southern intended to flaunt the mandate of the District Court. On the contrary, that court ruled that Southern had made a " . . . remarkable effort to comply with the Order." The only sham and hypocrisy evidenced here is that of the Brotherhood, which asserts that Southern's new firemen are human

"bags of sand", but nevertheless solicits them for and admits them to membership and collects their dues while at the same time seeking to deprive them of their jobs by means of this appeal.

ARGUMENT

POINT I

The District Court's refusal to hold Southern in criminal contempt is not subject to review on this appeal.

The Brotherhood would have this Court reverse the District Court's denial of its motion to have Southern adjudged guilty of criminal contempt. It asserts jurisdiction under 28 U. S. C. § 1291 (Br. p. 2). In our view, no jurisdiction of this aspect of the appeal resides in this Court under § 1291 or any other provision of law.

The Brotherhood's motion was " . . . equivalent to an information charging criminal contempt, under Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C., and a criminal contempt proceeding is a criminal case within the meaning of 18 U. S. C. § 3731." *United States v. Sanders*, 196 F. 2d 895, 897 (10th Cir. 1952), *cert. denied*, 344 U. S. 829 (1952). An order dismissing a criminal contempt application is appealable only under 18 U. S. C. § 3731, and then only at the behest of the United States, not upon the application of a private litigant. Since the United States is not a party to this proceeding, Southern is entitled to a dismissal of the Brotherhood's appeal on its criminal contempt charge.

Precisely this course was followed in *Hoffman v. Perrucci*, 222 F. 2d 709 (3rd Cir. 1955). There, the plaintiff in a negli-

gence action moved that certain insurance companies be adjudged in criminal contempt for obstructing justice by publishing certain advertisements and a pamphlet concerning the adverse effects of excessive jury awards on insurance rates. The District Court dismissed the motion and the plaintiff, a private litigant, appealed. The Third Circuit dismissed the appeal, saying (pp. 710-11, 712):

"Respondents move to dismiss this appeal on the ground that the proceedings below were for alleged criminal contempt and that appellants have no standing to appeal from the judgment dismissing them. If we are here dealing with an alleged criminal contempt the point is well taken for by statute only the United States or someone on its behalf may appeal from such a judgment. 18 U. S. C. § 3731; see *United States v. Sanders*, 10 Cir., 1952, 196 F. 2d 895, 897, certiorari denied 1952, 344 U. S. 829, 73 S. Ct. 33, 97 L. Ed. 645. There is no contention by appellants that they brought this appeal 'on behalf of the United States' nor was the original action in the district court entitled 'United States ex rel.' plaintiffs as was a prior proceeding founded on the same advertisements. *United States ex rel. May v. American Machinery Co.*, D. C. E. D. Wash. 1953, 116 F. Supp. 160.

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"The plaintiffs have here attempted to have respondents cited for criminal contempt but this appeal has not been taken 'by and on behalf of the United States' as required by the statute. The motion to dismiss must therefore be granted."

The same conclusion was reached in *Wingert v. Kieffer*, 29 F. 2d 59 (4th Cir. 1928), wherein the court ruled (pp. 60-1):

“ . . . We do not think, however, that the appeal from the order dismissing the charge of contempt and dissolving the restraining order brings up anything which we can review. The charge of contempt was brought, not to force compliance with an order of court, but to punish the receivers for an act of disobedience. It was therefore a proceeding in criminal contempt, and we have no power to review the order of the court exonerating the respondents. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *United States v. Bittner* (C. C. A. 4th), 11 F. (2d) 93.”

In *United States ex rel. West Virginia-Pittsburgh Coal Co. v. Bittner*, 11 F. 2d 93 (4th Cir. 1926) the court reached the same result, saying (p. 95):

“Treating the proceedings as for criminal contempts, there is no jurisdiction in this court to review the action and conclusion of the lower court exonerating the defendants from such contempts and dismissing the proceedings, for the reason that no appeal lies from the judgment in favor of the defendants in a criminal case, and this applies to criminal contempts as well as to other criminal cases. *United States v. Sanges*, 12 S. Ct. 609, 144 U. S. 310, 312, 36 L. Ed. 445; *Craig v. McCulloch*, 20 W. Va. 148; *Commonwealth v. Richardson*, 125 S. W. 147, 136 Ky. 699; *Rapalge on Contempts*, § 146. It may be said in this connection that the Criminal Appeals Act of March 2, 1907, chapter 2564, 34 Stat. L. 1246 (Comp. St. § 1704), affords no authority for appeal in this class of cases.”

See also, *Ramsburg v. American Investment Co. of Illinois*, 231 F. 2d 333, 338 (7th Cir. 1956). This Court took cogni-

zance of the issue in *Hawley v. Hawley*, 72 App. D. C. 357, 114 F. 2d 505, 507 (1940).

From all this it is plain that the District Court's dismissal of that part of the Brotherhood's motion which sought to have Southern adjudged in criminal contempt is not reviewable in this Court on this appeal. We, therefore, merely note that even if the United States were a party here, the Fifth Amendment would most probably bar reversal on the criminal aspects of the case (see, e.g., *Green v. United States*, 355 U. S. 184, 188 (1957)), the District Court's dismissal being analogous to an acquittal after a trial on the merits.

POINT II

The District Court's judgment based on its interpretation of its own order and its appraisal of the evidence should not be disturbed.

It is hornbook law that a " . . . defendant in a criminal contempt proceeding has the same protection as the defendant in any other criminal case. He is presumed innocent until proved guilty, and the party seeking his conviction must prove him guilty beyond a reasonable doubt." *United States v. United Mine Workers*, 89 F. Supp. 179, 180 (D. D. C. 1950), *app. dismissed*, 88 App. D. C. 341, 190 F. 2d 865 (1951). In civil contempt proceedings " . . . it is incumbent upon the parties seeking the adjudication of contempt to prove guilt by clear and convincing evidence and not by a mere preponderance of evidence." (*Ibid.*)

Not only did the Brotherhood fail to shoulder this burden of proof, but Southern demonstrated, and the District Court found, that the railroad had complied in good faith with the court's mandate as construed by the very judge who issued it. This judgment should not be disturbed unless

it can be shown (and indeed it has not been) that the District Court clearly exceeded its powers in construing its own decree and plainly erred in appraising the evidence presented to it. See, e.g., *Jewel Tea Co. v. Kraus*, 204 F. 2d 549, 550-51 (7th Cir. 1953); *Miller v. Zaharias*, 168 F. 2d 1, 3 (7th Cir. 1948), *cert. denied*, 335 U. S. 823 (1948); *Conley v. United States*, 59 F. 2d 929, 936 (8th Cir. 1932); Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780, 820-22 (1943).

The Brotherhood would have this Court disregard the considered determination of the District Court, reinterpret that court's order and set aside its findings of facts, many of which were either stipulated to or conceded by the Brotherhood. Such a course would contravene basic principles of effective legal administration. Appellate courts do not " . . . substitute [their] judgment on issues of fact for that of the trial court." *Bowles v. Huff*, 146 F. 2d 428, 431 (9th Cir. 1944). The soundness of this rule stems from the fact that appellate tribunals do not have " . . . the advantage of seeing and hearing the witnesses . . . and . . . cannot weigh with unerring accuracy the value attached by the trial court to the impressions stemming from trial experience." (*Ibid.*)

From all this it is apparent that the area open to this Court for review on this most unusual appeal is narrowly circumscribed. But, even if this were not so, the record in this case compels affirmance of the District Court's order.

A. Pre-employment Qualifications and the Duties of Firemen Were Not Before the Court in the Case in Chief and Were Outside the Scope of Its Injunction.

In *Terminal R.R. Ass'n v. United States*, 266 U. S. 17 (1924), the Court ruled that in contempt proceedings

"a decree will not be expanded beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts must constitute a plain violation of the decree so read."
(p. 29)

To the same effect, see, e.g., *Star Bedding Co. v. Englander Co., Inc.*, 239 F. 2d 537, 542 (8th Cir. 1957); *Cohn v. Kramer*, 136 F. 2d 293, 295-6 (6th Cir. 1943); *Denver-Greeley Valley Water Users Ass'n v. McNeil*, 131 F. 2d 67, 69 (10th Cir. 1942).

There are literally hundreds of practices affecting firemen, both written and unwritten, formal and informal, including those affecting their pre-employment qualifications and duties. No issue was raised in the case in chief nor was any evidence there offered concerning either pre-employment qualifications or the duties of firemen. As Judge Walsh noted, the Brotherhood expressly avoided these issues—the very ones which it now asserts should be read into the District Court's mandate (R. 36-37).^{*} In these circumstances, the District Court correctly concluded that to have applied its order to such matters as duties and pre-employment qualifications would have been an unwarranted expansion of its terms (Mem. & O. pp. 4-5).

^{*} To illustrate, Judge Walsh, responding to counsel for the Brotherhood, said:

"During the testimony that we have heard in this matter you have effectively and efficiently pointed out to this Court that the [duties] of the firemen [were] not relevant to the issue that was before the Court" (R. 37).

Indeed, the express language of the order under review provides that it will cease to be effective when " . . . the National Railroad Adjustment Board makes a determination . . . " in this case (J.A. 478). Southern's position before the Board is: "That under their agreement with their firemen they have no contractual obligation to hire new firemen" (J.A. 344). This claim, supported by an extensive submission of facts and arguments (J.A. 344-71), does not touch upon pre-employment criteria or what work, if any, firemen are to perform.

Thus, the Adjustment Board decision, which will automatically terminate the Court's status quo order, would not, even if favorable to the Brotherhood, pass upon the pre-employment qualifications or the duties of firemen. The scope of the status quo to be maintained under the court's order cannot, as a matter of simple logic, be broader than the scope of Southern's submission to the Board. Yet, the Brotherhood is here arguing that the court below should have employed the drastic weapon of contempt to broaden the scope of that status quo and issue directions *nunc pro tunc* concerning the details of the pre-employment qualifications and duties of firemen.

**B. In Any Event, Southern Had the Right to Set
and to Change Pre-employment Qualifications
for New Firemen.**

The Brotherhood asserted below, as it does here, that Southern violated the status quo injunction by changing its practices with respect to age, physical examinations and standards, and the educational level of its new hires. The Brotherhood, however, conceded that none of these matters is embodied in the collective bargaining agreement between the parties and that none of them had ever been a subject for collective bargaining. This concession, which

we believe is dispositive, is set forth explicitly in paragraph 15 of the pre-hearing stipulation (see p. 7, *supra*).

It nevertheless remains the Brotherhood's position that regardless of what may or may not have been a subject for collective bargaining, the District Court's order should somehow have been assumed to include Southern's practices pertaining to pre-employment qualifications as they existed in the period 1950-59. But, even if the Court's mandate was to be so construed, it would likewise have to reflect management's unfettered right during 1950-59 to change those qualifications and, thus, its equally unfettered right to do so today. With the recognition of this right, appellant's position collapses.

The Brotherhood is, therefore, left only with the accusation (and it is nothing more than an accusation) that Southern employed men who were 60 years of age and older, in order to flaunt the mandate of the District Court. On the other hand, E. M. Tolleson, Southern's Executive Vice President, testified without contradiction that Southern adopted this course in order rapidly to benefit from the attrition which Southern believes will be the remedy ultimately adopted as a solution to the fireman manning problem (R. 221, 259-61). As the witness expressed it: " . . . to employ younger men under those circumstances, would have, in our opinion, been just plain foolish" (R. 221). The District Court, which had full opportunity to appraise the credibility of this witness, concluded that Southern was not motivated by any intention to avoid or flaunt its order (Mem. & O. pp. 5-6). The record affords no basis for a contrary conclusion.

C. Southern's Revision of Its Operating Rules to Eliminate the Duties Specified for Firemen Did Not Violate the Mandate of the District Court.

Faced for the first time in almost four years with the necessity of having to hire new firemen, Southern decided to amend its operating rules, effective July 1, 1963, to eliminate redundant road freight and yard duties also being performed by head brakemen and engineers (R. 213, 224-25, D. Ex. 1). These new rules were applicable to all firemen regardless of when they were hired (R. 116, 216). As a result of these changes, no firemen in road freight or yard service are required to perform any operating duties and no firemen are disciplined for failing to perform them (R. 217).

The Brotherhood asserts that Southern's revision of its operating rules violated the court's order (Br. 14-31). The District Court ruled to the contrary, saying:

"Our Order of May 29 refers to 'working conditions', and specifically, to Section 4 of the Diesel Agreement which, under its present interpretation, requires that a fireman be employed on all locomotives. This order was entered pursuant to the plaintiff's successful contention that the carrier was not complying with this working condition which had been the subject of collective bargaining. The effect of our Order required that this condition be maintained, as required by Section 6 of the Railway Labor Act, 45 U. S. C. 156, until the matter was settled by the National Railroad Adjustment Board.

"There was no dispute at that time as to operating rules which were, and remain, the sole responsibility of management. To now expand that order to include rules as well as conditions would be an unwarranted interference with the functions of management" (Mem. & O. pp. 4-5).

This conclusion was supported by the following uncontroverted evidence:

First, Southern never consulted nor communicated with the Brotherhood or any other labor organization concerning the composition of its operating rules (R. 201-4, 216, 218, 252).

Second, Southern has, on at least three occasions in the past, revised those rules to eliminate the duties of crafts of employees (R. 249-58).

Third, over the years, many other unilateral changes were made by Southern in its operating rules. These changes included a complete revision of the 1943 rule book, effective August 1, 1956, as well as interim changes in both the 1943 and 1956 rules (D. Exs. 6-8).

Fourth, Southern was not the first railroad to have eliminated its operating rules specifying duties for firemen, the Chesapeake & Ohio having done so as early as 1958 (R. 267, D. Exs. 9-10).

Despite this history of unilateral change, the Brotherhood argues that the status quo injunction was meant to freeze Southern's operating rules as they were during the period 1950-1959. This argument, rejected below, is plainly fallacious. The exhibits and testimony graphically show that these operating rules were in the process of evolution and change throughout that period. Thus, even if the Court were to adopt the approach urged by the Brotherhood, it would also have to recognize that since management had the right to change its operating rules during 1950-1959, *a fortiori* it can do so today.

Also significant is the Brotherhood's concession that its collective bargaining agreement with Southern "does not contain a 'scope rule' such as is commonly found in collective bargaining agreements applicable" to other railroad

employees—the type of provision which sets forth the duties of the craft or class involved (Points and Authorities in Support of Motion for Reconsideration of Order Denying Plaintiff's Motion for Judgment of Contempt p. 2). The Brotherhood also admitted (*id.* at p. 3) that it “ . . . has not sought to negotiate a scope rule with Southern”

In these circumstances, what duties, if any, firemen may be required to perform fall under the carriers' operating rules which are, as the District Court ruled, “the sole responsibility of management.” It is settled that “[w]hat is within the terms of the contract is governed by it. What is without the terms of the contract is unaffected by it. Both the employer and the employee have complete freedom of action in this unaffected field.” *Amalgamated Association v. Greyhound Corp.*, 231 F. 2d 585, 587 (5th Cir. 1956); see also, *United States Steel Corp. v. Nichols*, 229 F. 2d 396, 400 (6th Cir. 1956), *cert. denied*, 351 U. S. 950 (1956); *NLRB v. Nash-Finch Co.*, 211 F. 2d 622, 626 (8th Cir. 1954).

To escape the effect of these concessions, the Brotherhood argues (Br. pp. 14-31) that there has been a shift of firemen's duties to brakemen and engineers which contravened the District Court's mandate. This argument, made *inter alia* in Plaintiff's Points and Authorities in Support of Motion for Reconsideration of Order Denying Plaintiff's Motion for Judgment of Contempt, was rejected without comment by the District Court (Order Denying Motion for Reconsideration).

There is substantial evidence in the record to support that rejection. Engineers have always been responsible for engine operations, and head brakemen have always been responsible for lookout duties and head-end protection. This was precisely the testimony of E. M. Tolleson, Southern's Executive Vice President (R. 224-25):

"The basis of our making the changes were that these duties that had been required of the firemen were nothing more or less than assisting duties, at best. They were not absolute governing duties. The head brakeman had always been charged with the responsibility of head-in [sic] protection. He had always been charged with the responsibility of look-out. The engineer had always been charged with the responsibility of checking gauges, and being absolutely responsible for the movement of the train in accordance with the signal indications. Those were duties that could readily be performed by the head brakeman and enginemen. Because they were thoroughly experienced in doing it. They could take care of it without in any way affecting the safety of operation.

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" . . . The diesel performance has improved over the years, and in our experience there is not too much if anything that a fireman can do. Certainly anything he can do, the engineer can do."

There was thus no shift of duties, but rather an elimination of redundant requirements because Southern's operating experience with the ever-improving Diesel engine demonstrated that there were simply no tasks for which a fireman was needed. Plainly, the revision of the carriers' operating rules was, therefore, not intended to flaunt the court's order (R. 215-16). On the contrary, the evidence provided a " . . . satisfactory explanation for the change in work rules" (Mem. & O. p. 6). The District Court, therefore, concluded that "[t]here ha[d] been no showing that this change was made in contempt of [its] order." (*Ibid.*)

The cases the Brotherhood cites on this point (Br. pp. 26-32) add nothing. They are inapposite and one of them, *Railroad Yardmasters of America v. St. Louis-San Fran-*

cisco & Texas Ry. Co., 218 F. Supp. 193 (S. D. Tex. 1963), has been reversed on appeal (see 55 LRRM 2583 (5th Cir. 1964)). Each of them goes to the elimination of employees rather than the elimination of redundant job content. None of them involved contempt proceedings.

There is therefore no factual or legal basis for disturbing the crucial finding below that Southern has made " . . . a remarkable effort to comply with the Order" or for finding any intent on the part of Southern to do otherwise.

POINT III

The Brotherhood has admitted that Southern's new hires are "firemen," thus branding frivolous its arguments to the contrary.

Under the Brotherhood's constitution, an applicant for membership must be " . . . actually employed as a locomotive fireman (helper) . . . or [be] holding seniority as such . . . " (R. 120). In addition, applicants for membership must " . . . be of good moral character, sober and industrious, not less than 16 years of age [*with no maximum age limit*] and be able to read and write the English language and understand [the Brotherhood's] constitution" (R. 102-3, 105-8, 164).

The gist of the Brotherhood's position on this appeal (as it was in the District Court) is that Southern's new employees are not "firemen," but abberations hired to flaunt the court's order—human "bags of sand" (Br. p. 34). The District Court rejected this unsupported charge (Mem. & O. pp. 5-6). Its conclusion was supported by uncontroverted testimony that the Brotherhood had been admitting these new hires into membership after actively soliciting them (R. 167-94). This testimony, laid bare the insincerity of the Brotherhood's unfounded charge.

Southern called to the stand four of its new firemen who had been admitted, or were about to be admitted, into membership in the Brotherhood. Like all of Southern's other firemen in road freight and yard service, these men had no duties to perform (Stip. par. 14, D. Ex. 1). All of them were over 60 years of age and three had no more than a fifth grade education; none of them had previously worked as a locomotive fireman (R. 167-94).

The testimony of these witnesses is summarized in the following table:

<u>Witness</u>	<u>Age</u>	<u>Schooling</u>	<u>Prior Occupation</u>	<u>Local Lodge</u>
J. H. Porter (R. 167-75)	64	"Third Grade None"	Hauling Foreman	Birmingham, Ala.
A. W. Lockett (R. 175-82)	61	Fourth Grade	Truck Driver	"
C. M. Redwine (R. 182-86)	66	Fifth Grade	Trolley Driver	Atlanta, Ga.
S. A. Ford (R. 187-94)	61	"Country Grade School"	Municipal Fireman	Knoxville, Tenn.

These men, and Southern's other new hires like them, were not the "illiterate", "feeble", "color blind" souls depicted in the Brotherhood's moving affidavit. Admittedly they were "actually employed" as firemen for membership and dues purposes.

An inevitable result of the Brotherhood's position, if upheld, is that these men would have to be discharged and other men hired in their places. This Court should not lend itself to the Brotherhood's callous suggestion that it should be permitted to accept these men into membership, to collect dues from them, and then to argue (Br. pp. 33-4) that they are not "actually employed" as firemen for purposes of this appeal.

CONCLUSION

Apart from the fact that this Court has no jurisdiction to review the lower court's denial of the motion to punish Southern for *criminal* contempt, the order claimed by the Brotherhood to have been violated by Southern was entered, however erroneously, to achieve a purpose unrelated either to the pre-employment qualifications or to the duties of firemen. Southern's changes in those qualifications and duties were made for valid reasons, frankly stated in oral testimony, in no way controverted, and uncontestably within Southern's rights as an employer. The court below, interpreting and applying its own order, weighed the evidence and found no misconduct on Southern's part. Its decision on both the criminal and civil phases of the case was fortified by the Brotherhood's own treatment of the newly hired firemen.

The order of the District Court should, therefore, in all respects be affirmed.

Respectfully submitted,

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